



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

HARVARD LAW LIBRARY



3 2044 066 109 232

USHER A. MOREN
ATTORNEY-AT-LAW

~~John R. Neff,
417-418 Tremont Bldg.,
Boston, Mass.~~

~~John
417-418 Tremont Bldg.,
Boston, Mass.~~

HARVARD LAW LIBRARY

MASSACHUSETTS REPORTS

179

CASES ARGUED AND DETERMINED
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS

MAY 1901 — OCTOBER 1901

HENRY WALTON SWIFT

REPORTER

BOSTON
LITTLE, BROWN, AND COMPANY
1902

Copyright, 1902,
BY LITTLE, BROWN, AND COMPANY.

UNIVERSITY PRESS:
JOHN WILSON AND SON, CAMBRIDGE, U.S.A.

JUSTICES
OF THE
SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS.

HON. OLIVER WENDELL HOLMES, CHIEF JUSTICE.

HON. MARCUS PERRIN KNOWLTON.

HON. JAMES MADISON MORTON.

HON. JOHN LATHROP.

HON. JAMES MADISON BARKER.

HON. JOHN WILKES HAMMOND.

HON. WILLIAM CALEB LORING.

ATTORNEY GENERAL.

HON. HOSEA MORRILL KNOWLTON.

TABLE

OF THE CASES REPORTED.

Abbott (Powow River National Bank <i>v.</i>)	386	Boston & Maine Railroad (Godard <i>v.</i>)	52
—— (Shepard <i>v.</i>)	300	—— <i>v.</i> Graham	62
Allen (Drake <i>v.</i>)	197	—— <i>v.</i> International Trust Co.	62
Amory <i>v.</i> Attorney General	89	—— (LaPointe <i>v.</i>)	535
Arancio (Leverone <i>v.</i>)	439	—— <i>v.</i> Morton	62
Armstrong (Munroe <i>v.</i>)	165	—— <i>v.</i> Vinton	62
Atlantic Mutual Life Ins. Co. <i>v.</i> Gannon	291	Boston Elevated Railway (Cobb <i>v.</i>)	212
Attorney General (Amory <i>v.</i>)	89	Boston National Bank (French <i>v.</i>)	404
—— <i>v.</i> Massachusetts Pipe Line Gas Co.	15	Bowen <i>v.</i> Boston & Albany Railroad	524
Atwood <i>v.</i> Walker	514	Bradley (Seaver <i>v.</i>)	329
Bacon <i>v.</i> Sandberg	396	Brewer Lumber Co. <i>v.</i> Boston & Albany Railroad	228
Bailey (National Bank of Commerce <i>v.</i>)	415	Bristol (Demelman <i>v.</i>)	163
Bangs <i>v.</i> Fallon	77	Brookline Gas Light Co. (Kinander <i>v.</i>)	341
Barnes (Osborne <i>v.</i>)	597	Brostrom <i>v.</i> Lauppe	315
Barry <i>v.</i> Lancy	112	Browne <i>v.</i> Boston	321
Bartlett (Cook <i>v.</i>)	576	Brummett <i>v.</i> Boston	26
Batchelder & Lincoln Corp. (Whiton <i>v.</i>)	169	Bumpus <i>v.</i> French	131
Berry <i>v.</i> Wasserman	537	Burnham <i>v.</i> Collateral Loan Co.	268
Bigelow <i>v.</i> Pierce	331	Burrell (Taunton Savings Bank <i>v.</i>)	421
Biggio <i>v.</i> Boston	356	Butman <i>v.</i> Newton	1
Blanchard <i>v.</i> Ely	586	Cadigan <i>v.</i> Crabtree	474
Boston (Biggio <i>v.</i>)	356	Chesley <i>v.</i> Nantasket Beach Steamboat Co.	469
—— (Browne <i>v.</i>)	321	Christie (Cummins <i>v.</i>)	74
—— (Brummett <i>v.</i>)	26	Clark <i>v.</i> Boston	409
—— (Clark <i>v.</i>)	409	Cobb <i>v.</i> Boston Elevated Railway	212
—— (Hendrie <i>v.</i>)	59		
—— (Worcester <i>v.</i>)	41		
Boston & Albany Railroad (Bowen <i>v.</i>)	524		
—— (Brewer Lumber Co. <i>v.</i>)	228		

Cobb v. Massachusetts Chemical Co.	423	Gloucester Water Supply Co. v. Gloucester	365
Collateral Loan Co. (Burnham v.)	268	Goddard v. Boston & Maine Railroad	52
Commonwealth v. O'Brien	533	—— v. Lowell	496
Compton v. Revere	413	Grace (Hall v.)	400
Connelly (Wiley v.)	360	Graham (Boston & Maine Railroad v.)	62
Cook v. Bartlett	576	Graves v. Johnson	53
Cormier (Sawin v.)	420	Green v. Everett	147
Cotting (Minot v.)	325	Griswold (Johnson v.)	580
Cox (O'Connell v.)	250		
Crabtree (Cadigan v.)	474	Hall v. Grace	400
Cummins v. Christie	74	Hall & Lyon Co. (Garst v.)	588
Cushman v. Cushman	601	Hallwood Cash Register Co. v. Lufkin	143
Dahlquist (White v.)	427	Hampden Paint & Chemical Co. (Sauford v.)	10
Dahlquist Manuf. Co. (White v.)	427	Harrington v. Glidden	486
D'Arcy v. Steuer	40	Harvey v. Smith	592
De Bussigny (Keith v.)	255	Haskell v. Merrill	120
Delaware Ins. Co. (Stuart v.)	434	—— (Miller v.)	312
Demelman v. Bristol	163	Heath (Stone v.)	385
Dixon v. New England Railroad	242	Hendrie v. Boston	59
Donnell v. Newburyport Homœopathic Hospital	187	Hoag (Jenks v.)	583
Drake v. Allen	197	Hogan v. Roche	510
Dugan (Moore v.)	153	Howe v. Howe	546
Dyme (McAuliffe v.)	214	—— v. Watson	30
		Hoyt (Munkley v.)	108
Ely (Blanchard v.)	586	Huntington (Fiske v.)	571
Everett (Green v.)	147		
Fallon (Bangs v.)	77	International Trust Co. (Boston & Maine Railroad v.)	62
Farmers' Fire Ins. Co. (Parker v.)	528	Irving v. Ford	216
Firth v. Rich	206	Ivarson v. Mulvey	141
Fiske v. Huntington	571		
Ford (Irving v.)	216	Jaquith v. Rogers	192
Fottler v. Moseley	295	Jeffrey v. Rosenfeld	506
Frazee v. Nelson	456	Jenks v. Hoag	583
French v. Boston National Bank	404	Johnson (Graves v.)	53
—— (Bumpus v.)	131	—— v. Griswold	580
Gannon (Atlantic Mutual Life Ins. Co. v.)	291		
Garst v. Hall & Lyon Co.	588	Keith v. De Bussigny	255
Giles v. Royal Ins. Co.	261	Kellogg v. Smith	595
Glidden (Harrington v.)	486	Kelly v. Wakefield & Stoneham Street Railway	542
Gloucester (Gloucester Water Supply Co. v.)	365	Keohane, petitioner	69
		Kiander v. Brookline Gas Light Co.	341
		Killian (Rochester Brewing Co. v.)	158
		Kingsbury (Stannard v.)	174

Lancy (Barry v.)	112	Newburyport Homœopathic Hospital (Donnell v.) . . .	187
—— (Perry v.)	183	Newcomb v. Norfolk Western Street Railway	449
Lander (Obery v.)	125	New England Railroad (Dixon v.)	242
LaPointe v. Boston & Maine Railroad	535	Newton (Butman v.)	1
Lauppe (Brostrom v.)	315	New York, New Haven, & Hartford Railroad (Middleborough v.)	520
Law v. O'Regan	107	Neylon v. Phillips	334
Leverone v. Arancio	439	Norfolk Western Street Railway (Newcomb v.)	449
Loneragan v. Waldo	135	Obery v. Lander	125
Long (Nazro v.)	451	O'Brien v. Mahoney	200
Lowell (Goddard v.)	496	—— (Commonwealth v.)	533
Lowell, Lawrence & Haverhill Street Railway (Sias v.)	343	O'Connell v. Cox	250
Lufkin (Hallwood Cash Register Co. v.)	143	O'Regan (Law v.)	107
McAuliffe v. Dyme	214	Osborne v. Barnes	597
Mahoney (O'Brien v.)	200	Paine Furniture Co. (Toland v.)	501
Marlborough Association v. Peters	61	Parker v. Farmers' Fire Ins. Co.	528
Martin v. Meles	114	—— v. Middlesex Mutual Assur. Co.	528
Massachusetts Chemical Co. (Cobb v.)	423	Pearson v. Treadwell	462
Massachusetts Pipe Line Gas Co. (Attorney General v.)	15	Perry v. Lancy	183
Meles (Martin v.)	114	Peters (Marlborough Association v.)	61
Merrill (Haskell v.)	120	Phillips (Neylon v.)	334
Middleborough v. New York, New Haven, & Hartford Railroad	520	Pierce (Bigelow v.)	331
Middlesex Mutual Assur. Co. (Parker v.)	528	Powow River National Bank v. Abbott	336
Miller v. Haskell	312	Reliance Ins. Co. (Stuart v.)	434
Minot v. Cotting	325	Revere (Compton v.)	413
Monk (Williams v.)	22	Rich (Firth v.)	206
Moore v. Dugan	153	Riley v. Tucker	190
Morton (Boston & Maine Railroad v.)	62	Rivers (Thayer v.)	280
Moseley (Fottler v.)	295	Roche (Hogan v.)	510
Mulvey (Ivarson v.)	141	Rochester Brewing Co. v. Kilian	158
Munkley v. Hoyt	108	Rogers (Jaquith v.)	192
Munroe v. Armstrong	165	Rollins (Scollans v.)	346
Nantasket Beach Steamboat Co. (Chesley v.)	469	Rosenfeld (Jeffrey v.)	506
National Bank of Commerce v. Bailey	415	Royal Ins. Co. (Giles v.)	261
National Granite Bank v. Tynedale	390	Sandberg (Bacon v.)	396
Nazro v. Long	451	Sanford v. Hampden Paint & Chemical Co.	10
Nelson (Frazee v.)	456		

Sawin <i>v.</i> Cormier	420	Tyndale (National Granite Bank <i>v.</i>)	390
Scollans <i>v.</i> Rollins	346		
Seaver <i>v.</i> Bradley	329	Vinton (Boston & Maine Railroad <i>v.</i>)	62
Shady Hill Nursery Co. <i>v.</i> Waterer	318		
Shepard <i>v.</i> Abbott	300	Wakefield & Stoneham Street Railway (Kelly <i>v.</i>)	542
Sias <i>v.</i> Lowell, Lawrence & Haverhill Street Railway	343	Waldo (Loneragan <i>v.</i>)	135
Slattery <i>v.</i> Walker & Pratt Manuf. Co.	307	Walker (Atwood <i>v.</i>)	514
Smith (Harvey <i>v.</i>)	592	Walker & Pratt Manuf. Co. (Slattery <i>v.</i>)	307
—— (Kellogg <i>v.</i>)	595	Wasserman (Berry <i>v.</i>)	537
Stannard <i>v.</i> Kingsbury	174	Waterer (Shady Hill Nursery Co. <i>v.</i>)	318
Stanwood <i>v.</i> Stanwood	223	Watson (Howe <i>v.</i>)	30
Steuer (D'Arcy <i>v.</i>)	40	Webb (Sylvester <i>v.</i>)	236
Stone <i>v.</i> Heath	385	Whicher (Wyman <i>v.</i>)	276
—— <i>v.</i> Stone	555	White <i>v.</i> Dahlquist	427
Stuart <i>v.</i> Delaware Ins. Co.	434	—— <i>v.</i> Dahlquist Manuf. Co.	427
—— <i>v.</i> Reliance Ins. Co.	434	Whiton <i>v.</i> Batchelder & Lincoln Corp.	169
Sylvester <i>v.</i> Webb	236	Wiley <i>v.</i> Connelly	360
		Williams <i>v.</i> Monk	22
Taunton Savings Bank <i>v.</i> Burrell	421	Worcester <i>v.</i> Boston	41
Thayer <i>v.</i> Rivers	280	Wyman <i>v.</i> Whicher	276
Toland <i>v.</i> Paine Furniture Co.	501		
Treadwell (Pearson <i>v.</i>)	462		
Tucker (Riley <i>v.</i>)	190		

TABLE OF CASES

CITED BY THE COURT.

Adams v. Conliard, 102 Mass. 167	58	Bangs v. Snow, 1 Mass. 181	491
— v. Frothingham, 8 Mass. 352	379	Barker v. Loring, 177 Mass. 389	447
— v. Frye, 3 Met. 103	508	Barley v. Walford, 9 Q. B. 197	298
— v. Swansea, 116 Mass. 591	254	Barney v. Lowell, 98 Mass. 570	8
Adlard v. Muldoon, 45 Ill. 198	443	Barrie v. Earle, 143 Mass. 1	130
Adler v. Fenton, 24 How. 407	585	Barringer v. King, 5 Gray, 9	518
Ailsa, The, 76 Fed. Rep. 868	473	Barrow, Ex parte, 6 Ch. D. 783	231
Allen v. Cerro Gordo Co. 40 Iowa, 349	40	Barry v. Lancy, 179 Mass. 112	186
— v. Jarvis, 20 Conn. 38	261	Bartholomew v. McKinstry, 6 Allen, 567	196
Alton v. First National Bank of Webster, 157 Mass. 341	123	Bartlett v. Brickett, 98 Mass. 521	41
Amesbury Woollen & Cotton Manuf. Co. v. Amesbury, 17 Mass. 461	492	— v. Stanchfield, 148 Mass. 394	448
Amherst Academy v. Cows, 6 Pick. 427	117	Batchelder, Re, 2 Lowell, 245	235
Andrews v. Keith, 168 Mass. 558	260	Batchelder v. Hutchinson, 161 Mass. 462	600
— v. Sargent, 71 Vt. 257	190	— v. Rand, 117 Mass. 176	599
Arnold v. Delano, 4 Cush. 38	284	— v. Sturgis, 3 Cush. 201	139
Athol Music Hall Co. v. Carey, 116 Mass. 471	119	Bates v. Boston, 6 Cush. 93	493
Atkinson v. Hawdon, 2 A. & E. 628	508	— v. Buchanan, 2 Bush, 117	41
— v. Newton, 169 Mass. 240	161	Battles v. Fobes, 21 Pick. 239	419
Attorney General v. Algonquin Club, 153 Mass. 447	399	— v. —, 2 Met. 93	419
— v. Bay State Mining Co. 99 Mass. 148	19	Baxter National Bank v. Talbot, 154 Mass. 213	519
— v. Hall, FitzG. 314	421	Belcher v. Costello, 122 Mass. 189	180
— v. Newark-upon-Trent, 1 Hare, 395	105	— v. Farrar, 8 Allen, 825	887
Austin v. Barrows, 41 Conn. 287	585	Belden v. Chase, 150 U. S. 674	471
Ayer v. Tilden, 15 Gray, 178	518	Belknap v. National Bank of North America, 100 Mass. 376	854
Baber's trusts, In re, L. R. 10 Eq. 554	418	Beltzhoover v. Costen, 7 Barr, 13	190
Bailey v. Woburn, 126 Mass. 416	874	Benjamin A. Van Brunt, The, 98 Fed. Rep. 181	472
Bain v. Fothergill, L. R. 6 Ex. 59	517	Bennett v. Lycoming County Mutual Ins. Co. 67 N. Y. 274	531
— v. —, L. R. 7 H. L. 168	517	Bent v. Erie Telegraph & Telephone Co. 144 Mass. 165	208
Balday v. Parker, 2 B. & C. 37	407	Bickel v. Sheets, 24 Ind. 1	58
Baldwin v. Munn, 2 Wend. 399	517	Bigelow v. Bemis, 2 Allen, 496	15
— v. Wilbraham, 140 Mass. 459	241	Bingham v. Boston, 161 Mass. 8	29
Ballou v. Billings, 136 Mass. 307	119	— v. Jordan, 1 Allen, 373	124
Baltimore v. Gill, 81 Md. 876	824	Black v. Bachelder, 120 Mass. 171	412
Bancroft v. Fitch, 164 Mass. 401	226	Black Hawk County v. Springer, 58 Iowa, 417	133
		Blair v. Forehand, 100 Mass. 186	583
		Blaisdell v. Stevens, 16 Vt. 179	468
		Blake v. Sawin, 10 Allen, 840	196
		Blanchard v. Ayer, 148 Mass. 174	6

Blaney v. Rice, 20 Pick. 62	258	Callahan v. Woodbridge, 171 Mass. 595	551
Blewitt, Matter of, 181 N. Y. 541	184	Cambridge v. Munroe, 126 Mass. 496	387
Blood v. Robinson, 1 Cush. 389	268	Carleton v. Ashburnham, 102 Mass. 848	493
Blythe v. Ayres, 96 Cal. 532	221	Carpenter v. German American Ins. Co. 135 N. Y. 298	532
Boardman v. Cutter, 128 Mass. 388	407	Carr v. Atkinson, L. R. 14 Eq. 397	289
Bonnemort v. Gill, 165 Mass. 493	513	Carter v. Carter, 109 Mass. 306	267
Borrowman v. Free, 48 L. J. Q. B. (N. S.) 65	146	Casey v. Malden, 163 Mass. 507	336
Boston & Albany Railroad v. Charlton, 161 Mass. 32	521	Cassidy v. Charlestown Five Cents Savings Bank, 149 Mass. 325	569
Boston & Providence Railroad v. Midland Railroad, 1 Gray, 340	378	Chamberlin v. Ball, 15 Gray, 352	459
Boston, Concord & Montreal Railroad v. Boston & Lowell Railroad, 65 N. H. 393	67	Chandler v. Jamaica Pond Aqueduct, 114 Mass. 575	378
Boston Excelsior Co. v. Bangor & Aroostook Railroad, 93 Maine, 52	527	Charlestown Branch Railroad v. County Commissioners, 7 Met. 78	378
Boston Relief & Submarine Co. v. Burnett, 1 Allen, 410	41	Chase v. Hathaway, 14 Mass. 222	184, 465
Boston Water Power Co. v. Boston, 9 Met. 199	492	Chase's Patent Elevator Co. v. Boston Tow-Boat Co. 152 Mass. 428	19
Bourne v. Boston, 2 Gray, 494	498	Chavannes v. Priestley, 80 Iowa, 316	183
Boyd v. Freize, 5 Gray, 553	408	Cheek v. Nall, 112 N. C. 370	509
Brackett v. Boston, 157 Mass. 177	152	Chenery v. Holden, 16 Gray, 125	172
Bradford v. Monks, 182 Mass. 405	227	Chicago & Northeastern Railroad v. Sturgis, 44 Mich. 538	364
Bradley v. Fuller, 118 Mass. 289	299, 586	Chick v. Nute, 176 Mass. 57	124
Bradshaw v. South Boston Railroad, 135 Mass. 407	247	Childs v. Anderson, 128 Mass. 108	168
Bragg v. Danielson, 141 Mass. 195	117, 408	Chipman v. Manufacturers' National Bank, 156 Mass. 147	124
Braunn v. Keally, 146 Penn. St. 519	58	Chitty v. Bray, 48 L. T. (N. S.) 860	400
Brewster v. Warner, 136 Mass. 57	74	Clark v. Child, 136 Mass. 344	518
Brick v. Bosworth, 162 Mass. 334	249	— v. Clark, 168 Mass. 523	512
Brickett v. Haverhill Aqueduct Co. 142 Mass. 394	874	— v. Henry, L. R. 11 Eq. 222	190
Bride v. Clark, 161 Mass. 130	579	— v. Lancy, 178 Mass. 460	113
Bridgewater Academy v. Gilbert, 2 Pick. 579	117	— v. McMahon, 170 Mass. 91	196
Briggs v. Gilman, 127 Mass. 530	443	— v. Marsiglia, 1 Den. 317 118, 261	
Brigham v. Bigelow, 12 Met. 268	14	— v. New England Ins. Co. 6 Cush. 342	438
Brimblecom v. Haven, 12 Cush. 511	554	Clemens v. Estes, 22 Fed. Rep. 899	591
Britannia, The, 153 U. S. 130	472	Clergy Orphan Corporation, In re, [1894] 3 Ch. 145	106
Brookfield v. Reed, 152 Mass. 568	6	Clifton v. Foster, 108 Mass. 233	364
Brooks v. Holden, 175 Mass. 137	246	Clinton v. Norfolk Mutual Ins. Co. 176 Mass. 486	438
Brown v. Evans, 6 Allen, 333	267	Clough v. Seay, 49 Iowa, 111	509
— v. London Assurance Co. 40 Hun, 101	532	Cockcroft v. New York & Harlem Railroad, 69 N. Y. 201	517
— v. Winnisimmet Co. 11 Allen, 326	379	Codman v. Johnson, 104 Mass. 491	25
Bryan v. Twigg, L. R. 3 Ch. 183	226	Coggeshall v. Potter, Holmes, 75	124
Buckley v. Old Colony Railroad, 161 Mass. 26	596	Coleman v. Mechanics' Iron Foundry Co. 168 Mass. 254	311
Burdett v. Lewis, 7 C. B. (N. S.) 791	588	— v. New York & New Haven Railroad, 106 Mass. 460	248
Burnaby v. Baillie, 42 Ch. D. 282	289	Collins v. Delaporte, 115 Mass. 159	118, 261
Burton's appeal, 93 Penn. St. 214	353	— v. Greenfield, 172 Mass. 78	6
Burton v. Conigland, 82 N. C. 99	189	— v. Wickwire, 162 Mass. 143	448
Buxfield v. Wheeler, 14 Allen, 139	158	Colonial Bank v. Cady, 15 App. Cas. 267	353
Butler v. Watkins, 13 Wall. 456	298	Commonwealth v. Alden, 143 Mass. 113	387
Butterfield v. Reed, 160 Mass. 361	379	— v. Aves, 18 Pick. 193	221
Buttrick v. Lowell, 1 Allen, 172	6	— v. Boston & Lowell Railroad, 12 Cush. 254	415
Cahill v. Capen, 147 Mass. 498	158		
Calahan v. Babcock, 21 Ohio St. 281	281		
Call v. Hagger, 8 Mass. 428	15		

Commonwealth v. Brayman, 136 Mass. 438	518	Davis v. Bronson, 2 No. Dak. 300	118
— v. Clancy, 154 Mass. 128	123	— v. Campbell, 93 Iowa, 524	119
— v. Costello, 120 Mass. 858	541	— v. Parsons, 167 Mass. 584	284, 509
— v. Galavan, 9 Allen, 271	534	Day v. Laffin, 6 Met. 280	268
— v. Gorham, 99 Mass. 420	109	Dean v. Tallman, 105 Mass. 443	407
— v. Hopkins, 2 Dana, 418	584	Deane v. Randolph, 132 Mass. 475	0
— v. Kennedy, 170 Mass. 18	58	Dedham Bank v. Richards, 2 Met. 105	419
— v. Kiley, 150 Mass. 825	110	Denny v. Tyler, 8 Allen, 225	183
— v. Lancaster Savings Bank, 123 Mass. 493	19	Distilling Co. v. Nutt, 34 Kans. 724	58
— v. Lockwood, 109 Mass. 828	109	Dixon v. New England Railroad, 179 Mass. 242	274
— v. Parker, 4 Allen, 813	534	Doane v. Russell, 8 Gray, 382	365
— v. Peaselee, 177 Mass. 267	58	Doe v. Murlees, 6 M. & S. 110	459
— v. People's Five Cents Savings Bank, 5 Allen, 428	19	— v. Smith, Holt N. P. 589	459
— v. Provident Institution for Savings, 12 Allen, 812	19	— v. —, 2 Stark. 199	459
— v. Russell, 160 Mass. 8	246	Donahue v. Windsor County Mutual Ins. Co. 56 Vt. 374	532
— v. Taylor, 8 Met. 72	221	Donnell v. Boston Tow Boat Co. 89 Fed. Rep. 757	472
Cone v. Forest, 126 Mass. 97	492	Donohue v. Woodbury, 6 Cush. 148	412
Conger v. Weaver, 20 N. Y. 140	517	Dorr v. Boston, 6 Gray, 181	494
Conner v. Comstock, 17 Ind. 90	41	— v. Johnson, 170 Mass. 540	189
Cook v. Allen, 2 Mass. 462	203	Dow v. Northern Railroad, 67 N. H. 1	67
— v. Holbrook, 146 Mass. 66	195	— Whitney, 147 Mass. 1	569
Cooper, Ex parte, 11 Ch. D. 68	231	Dowdell, petitioner, 169 Mass. 387	183
— v. Galbraith, 8 Wash. C. C. 546	459	Dowling v. Morrill, 165 Mass. 491	481
— v. McKenna, 124 Mass. 284	249	Dowling's trusts, In re, L. R. 14 Eq. 463	190
— v. Pena, 21 Cal. 403	40	Downey v. Lancy, 178 Mass. 465	113
Cort v. Ambergate Railway, 17 Q. B. 127	261	Drum v. Drum, 133 Mass. 566	508
Cottage Street Church v. Kendall, 121 Mass. 528	116	Drury v. Hervey, 126 Mass. 519	584
Cowdrey v. Woburn, 136 Mass. 409	374	— v. Midland Railroad, 127 Mass. 571	378
Cowles v. Merchants, 140 Mass. 377	513	— v. Newman, 99 Mass. 256	481
Cowley v. Dobbins, 123 Mass. 587	267	Dunklee v. Crane, 103 Mass. 470	601
Crapo v. Stetson, 8 Met. 393	495	Durfee v. Old Colony & Fall River Railroad, 5 Allen, 280	67
Cravens v. Eagle Cotton Mills Co. 120 Ind. 6	119	Durgy Cement & Umber Co. v. O'Brien, 123 Mass. 12	231
Crocker v. Cotting, 170 Mass. 68	204	Eales v. Cardigan, 9 Sim. 384	226
— v. Dillon, 133 Mass. 91	123	Earle v. Coburn, 130 Mass. 596	259
Croswell v. Labree, 81 Maine, 44	509	Earles v. Wells, 94 Wis. 285	324
Cummings v. Cummings, 146 Mass. 501	554	Easter v. Foster, 173 Mass. 39	74
Currier v. Howard, 14 Gray, 511	456	Easterbrooks v. Tillinghaast, 5 Gray, 17	227
Curtis v. Hubbard, 9 Met. 322	234, 509	Ela v. Yeaw, 158 Mass. 190	462
Cutter v. Hamlen, 147 Mass. 471	505, 586	Ellenwood v. Burgess, 144 Mass. 534	599
Cutting v. Grand Trunk Railway, 13 Allen, 881	139	Ellicott v. Coffin, 106 Mass. 365	267
Dalby, Ex parte, 1 Lowell, 431	124	Elliott v. Blair, 47 Ill. 342	509
Dalrymple v. Scott, 19 Ont. App. 477	119	— v. Thomas, 3 M. & W. 170	407
Danforth v. Walker, 87 Vt. 239	261	Emerson v. Gerber, 178 Mass. 130	119
Daniels v. Lowell, 139 Mass. 56	506	Emmons v. Shaw, 171 Mass. 410	551
— v. Newton, 114 Mass. 530	119	Engel v. New York, Providence, & Boston Railroad, 160 Mass. 260	192
Danvers Bank v. Salem Bank, 151 Mass. 280	354	England v. Boston & Maine Railroad, 153 Mass. 490	536, 596
Dater v. Earl, 3 Gray 482	58	Evans v. Mary A. Riddle Co. 43 Atl. Rep. 894	400
Davidson v. Boston & Maine Railroad, 3 Cush. 91	377	Ewing v. King, 169 Mass. 97	341
— v. Cooper, 11 M. & W. 778	507	Exchange Telegraph Co. v. Central News, [1897] 2 Ch. 48	591
— v. —, 13 M. & W. 343	507		
Davis v. Bilsland, 18 Wall. 659	364		

Farnsworth v. Boston, 126 Mass. 1	49	Gray v. Kettell, 12 Mass. 161	492
Farrington v. Hodgdon, 119 Mass. 453	119	Grébert Borgnis v. Nugent, 15 Q. B. D. 85	140
Farwell v. Rogers, 99 Mass. 33	459	Green v. Collins, 3 Cliff. 494	58
Felton v. Minot, 7 Allen, 412	158	— v. Putnam, 8 Cush. 21	380
Fenwick v. Floyd, 1 Har. & Gill, 172	459	Greenough v. Welles, 10 Cush. 571	227
Field v. Roosa, 159 Mass. 123	260	Grout v. Hill, 4 Gray, 361	235
First National Bank v. Watkins, 154 Mass. 385	38	Gunn v. New York, New Haven, & Hartford Railroad, 171 Mass. 417	505
First National Bank of Easton v. Smith, 138 Mass. 26	419		
First National Bank of Salem v. Almy, 117 Mass. 476	20	Hafford v. New Bedford, 16 Gray, 297	6
Fisher v. Boston, 104 Mass. 87	6	Hall v. Bliss, 118 Mass. 554	594
Fitch v. Stevens, 4 Met. 426	379	— v. Eaton, 25 Vt. 458	585
Fitchett v. Smith, 78 Va. 524	221	— v. Marston, 17 Mass. 575	365
Fitzpatrick v. Gilson, 176 Mass. 477	481	— v. United States, 92 U. S. 27	220
Flagg v. Mason, 8 Gray, 556	254	Hallahan v. Herbert, 57 N. Y. 409	364
Fleet v. Lockwood, 17 Conn. 233	41	Hamor v. Bar Harbor Water Co. 78 Maine, 127	374
Fletcher v. Button, 6 Barb. 646	517	Hanauer v. Doane, 12 Wall. 342	58
— v. Webster, 5 Allen, 566	268	Hano v. Bigelow, 155 Mass. 341	398
Flureau v. Thornhill, 2 W. Bl. 1078	617	Hanson v. Willard, 12 Maine, 142	203
Ford v. Fitchburg Railroad, 110 Mass. 240	309	Hardiman v. Brown, 162 Mass. 585	505
— v. Ticknor, 169 Mass. 276	421	Harlow v. Hall, 132 Mass. 232	124
— v. Tirrell, 9 Gray, 401	279	Harnden v. Milwaukee Mutual Ins. Co. 164 Mass. 382	531
Fowle v. Park, 131 U. S. 88	591	Harrington v. Harrington, 107 Mass. 329	580
Frazier v. Simmons, 139 Mass. 531	181	— v. McCarthy, 169 Mass. 492	399
Freeland v. Wright, 154 Mass. 492	123	Harris, In re, 7 Del. Ch. 42	133
French v. Braintree Manuf. Co. 23 Pick. 216	379	Harris v. Cooper, 31 U. C. Q. B. 182	222
Frost v. Beekman, 1 Johns. Ch. 288	88	— v. Marblehead, 10 Gray, 40	164
— v. Curtis, 167 Mass. 251	226	Harrison v. Maynard, 61 Fed. Rep. 689	591
— v. Knight, L. R. 7 Ex. 111	119		
Fuller v. New York, New Haven, & Hartford Railroad, 175 Mass. 424	312	Harvard College v. Aldermen of Boston, 104 Mass. 470	25
		Harvey v. Connecticut & Passumpsic Rivers Railroad, 124 Mass. 421	139
Gardner v. Boston, 120 Mass. 266	267	Haskell v. Varina, 111 Mass. 84	460
Garfield v. Bemis, 2 Allen, 445	552	Hatch v. Fuller, 131 Mass. 574	580
Garst v. Harris, 177 Mass. 72	591	Hatfield v. Phillips, 12 Cl. & Fin. 843	354
German v. Chapman, 7 Ch. D. 271	399	— v. —, 14 M. & W. 665	854
Gerrish v. Gary, 120 Mass. 182	564	Hathaway v. Clark, 5 Pick. 490	455
Gibbens v. Gibbens, 140 Mass. 102	226	— v. Hatchard, 180 Mass. 296	249
Gibbons v. Bente, 51 Minn. 499	119	Hawks v. Charlemont, 107 Mass. 414	6
Gibson, appellant, 154 Mass. 878	134	Hayden v. Foster, 13 Pick. 492	549
Gibson v. International Trust Co. 177 Mass. 100	197	Hayes v. Jackson, 159 Mass. 451	481
Gifford v. Choate, 100 Mass. 843	421	Hayne's trusts, In re, 18 L. T. (N. S.) 16	190
Gill v. Bicknell, 2 Cush. 355	433	Hazard v. Loring, 10 Cush. 267	186
Gillette v. Smith, 18 Hun, 10	509	Hazen v. Boston & Maine Railroad, 2 Gray, 574	378
Glacius v. Black, 50 N. Y. 145	443	Heath v. Blake, 28 S. C. 406	509
Glendale, The, 81 Fed. Rep. 633	472	Heidelberg, Ex parte, 2 Low. 526	518
Glenn v. Thistle, 23 Miss. 42	518	Heli, Matter of, 3 Atk. 635	133
Glover v. Boston, 14 Gray, 282	373	Hennessey v. New Bedford, 153 Mass. 260	5
Glynn v. Central Railroad, 175 Mass. 510	853	H. F. Dimock, The, 77 Fed. Rep. 226	472
Goff v. Rehoboth, 2 Cush. 475	279	—, 22 C. C. A. 123	472
Gogin v. Walsh, 124 Mass. 516	158	Hicks v. New York, New Haven, & Hartford Railroad, 164 Mass. 424	545
Goreley v. Butler, 147 Mass. 8	865		
Gorton v. Hadsell, 9 Cush. 508	246		
Gowen v. Klous, 101 Mass. 449	431		
Gragg v. Learned, 109 Mass. 167	459		
Graves v. Bemis, 8 Allen, 573	158		
— v. Johnson, 156 Mass. 211	57		

<i>Hill v. Middlesex Mutual Assurance Co.</i> 174 Mass. 542	488	<i>Jaquith v. Massachusetts Baptist Convention</i> , 172 Mass. 489	196
— <i>v. Spear</i> , 50 N. H. 253	58	<i>Jarvis v. Rogers</i> , 13 Mass. 105	353
<i>Hilliard v. Kearney</i> , Busb. Eq. 221	189	— <i>v. —</i> , 15 Mass. 889	853
<i>Hills v. Metzendorf</i> , 173 Mass. 423	398	<i>Jeffris v. Fitchburg Railroad</i> , 93 Wis. 250	232
<i>Hinckley v. Union Pacific Railroad</i> , 129 Mass. 52	354	<i>Jenkins v. Andover</i> , 103 Mass. 94	575
<i>Hodges v. Hodges</i> , 5 Met. 205	379	— <i>v. Stetson</i> , 9 Allen, 128	39
<i>Hoffman v. Pitt</i> , 5 Esp. 22	459	<i>Jenney v. Wilcox</i> , 9 Allen, 245	340
<i>Holland v. Taylor</i> , 111 Ind. 121	294	<i>Jensen v. Waltham</i> , 186 Mass. 844	7
<i>Holliday v. McKinne</i> , 22 Fla. 153	41	<i>Jochumsen v. Suffolk Savings Bank</i> , 3 Allen, 87	455
<i>Hollingsworth & Vose Co. v. Foxborough Water Supply District</i> , 165 Mass. 186	873	<i>John A. Roebling's Sons' Co. v. Lock Stitch Fence Co.</i> 130 Ill. 660	119
<i>Holmes v. Hunt</i> , 122 Mass. 505	277	<i>Johnson v. Battelle</i> , 125 Mass. 453	421
<i>Home v. Pillans</i> , 2 Myl. & K. 15	190	— <i>v. Johnson</i> , 45 Mo. 595	222
<i>Home Ins. Co. v. Davis</i> , 98 Penn. St. 280	532	— <i>v. Otterbein University</i> , 41 Ohio St. 527	116
<i>Hooper v. Bradbury</i> , 133 Mass. 303	189	<i>Johnson's trusts, In re</i> , 10 L. T. (N. S.) 455	190
— <i>v. Bradford</i> , 178 Mass. 95	551	<i>Johnstone v. Milling</i> , 16 Q. B. D. 460	119
<i>Hopedale Machine Co. v. Entwistle</i> , 133 Mass. 443	102	<i>Jones v. Collins</i> , 177 Mass. 444	9, 414
<i>Hopkins v. Shepard</i> , 129 Mass. 600	518	— <i>v. Keen</i> , 115 Mass. 170	123
<i>Horne v. Midland Railway, L. R. 8 C. P.</i> 131	140	— <i>v. Randall</i> , 1 Jac. & W. 100	226
<i>Horton v. Earle</i> , 162 Mass. 448	226	<i>Joyner v. Egremont School District</i> , 3 Cush. 567	492
<i>Howard v. Union Freight Railroad</i> , 156 Mass. 159	10		
— <i>v. Worcester</i> , 153 Mass. 426	6	<i>Keene v. Aldrich</i> , 19 R. I. 809	509
<i>Howe v. Boston</i> , 7 Cush. 278	493	<i>Kelly v. Wakefield & Stoneham Street Railway</i> , 175 Mass. 331	545
— <i>v. Watson</i> , 179 Mass. 30	408	<i>Kemp v. Falk</i> , 7 App. Cas. 578	231
<i>Howland v. India Ins. Co.</i> 131 Mass. 239	531	<i>Kenison v. Arlington</i> , 144 Mass. 456	873
<i>Hubbard v. Moore</i> , 24 La. An. 501	58	<i>Kenton, Matter of</i> , 5 Binn. 618	183
<i>Hudson, In re</i> , 54 L. J. Ch. 811	118	<i>Kimball v. Howard Ins. Co.</i> 8 Gray, 33	531
<i>Hunnell v. Haskell</i> , 174 Mass. 557	503	<i>King v. Ramsay</i> , 13 Ill. 619	41
<i>Hurlburt v. Boxford</i> , 171 Mass. 501	575	— <i>v. Tirrell</i> , 2 Gray, 331	15
<i>Hurley v. Brown</i> , 98 Mass. 545	39	<i>Klous v. Hennessey</i> , 13 R. I. 332	585
		<i>Knight v. Cunningham</i> , 106 Mass. 580	841
<i>Ingersoll v. Stockbridge & Pittsfield Railroad</i> , 8 Allen, 438	528	— <i>v. Simmonds</i> , [1896] 2 Ch. 294	399
<i>Inglee v. Bosworth</i> , 5 Pick. 498	492	<i>Knox v. Eden Musee American Co.</i> 148 N. Y. 441	352
<i>Ingram v. Cowles</i> , 150 Mass. 155	493		
— <i>v. Ingram</i> , 2 Atk. 88	289	<i>La Bourgogne</i> , 30 C. C. A. 203	473
<i>Inman v. Western Ins. Co.</i> 12 Wend. 452	532	— <i>86 Fed. Rep.</i> 475	473
<i>Inslee v. Lane</i> , 57 N. H. 464	281	<i>Ladies' Collegiate Institute v. French</i> , 16 Gray, 196	116
<i>Insurance Co. of North America v. Brim</i> , 111 Ind. 281	531	<i>La Force v. Williams City Ins. Co.</i> 48 Mo. App. 518	532
<i>Ipswich Grammar School v. Andrews</i> , 8 Met. 584	380	<i>Lamb v. Old Colony Railroad</i> , 140 Mass. 79	10
<i>Ironwood Water-Works Co. v. Ironwood</i> , 99 Mich. 454	824	— <i>v. Stone</i> , 11 Pick. 527	299, 585
<i>Ives v. Sterling</i> , 6 Met. 310	117	<i>Lambert v. Robinson</i> , 162 Mass. 84	249
		<i>Lancy v. Abington Savings Bank</i> , 177 Mass. 431	113
<i>Jackson v. Nichol</i> , 5 Bing. N. C. 508	231	<i>Landers v. Adams</i> , 165 Mass. 415	422
— <i>v. Phillips</i> , 14 Allen, 539	221	<i>Lark v. Bande</i> , 4 Mo. App. 186	274
— <i>Winniffrith</i> , 47 L. T. (N. S.) 243	400	<i>Lawler, In re</i> , Ir. Rep. 8 Eq. 506	133
<i>James v. Griffin</i> , 2 M. & W. 623	231	<i>Lawrence v. Congregational Church of Greenfield</i> , 164 N. Y. 115	364
— <i>v. Southern Lumber Co.</i> 153 Mass. 361	268	<i>Le Donne, petitioner</i> , 173 Mass. 550	184
<i>Jameson v. Gregory</i> , 4 Met. (Ky.) 383	58	<i>Lee v. Butler</i> , 167 Mass. 426	608

Leggate v. Moulton, 115 Mass. 552	586	Michael v. Bacon, 49 Mo. 474	58
Leonard v. Whitney, 109 Mass. 265	74	Midland Railway. v. Wilcox, 122 Ind. 84	364
Lerned v. Johns, 9 Allen, 419	431	Milbery v. Storer, 75 Maine, 69	509
— v. Wannemacher, 9 Allen, 412	432	Miles v. Schmidt, 168 Mass. 839	266
Levi v. Brooks, 121 Mass. 501	249	Millard v. Egremont, 164 Mass. 430	575
Lewin v. Folsom, 171 Mass. 188	87	Miller v. Horton, 152 Mass. 540	387
Lewis v. Boston, 130 Mass. 339	377	— v. Hyde, 161 Mass. 472	222
Lexington Print Works v. Canton, 167 Mass. 341	373	— v. Race, 1 Burr. 452	354
Lincoln v. Whittenton Mills, 12 Met. 81	268	Milliken v. Pratt, 125 Mass. 374	58
— v. Worcester, 8 Cush. 55	493	Minor v. Jones, 2 Redf. 289	221
Linzee v. Mixer, 101 Mass. 512	899	Minot v. Winthrop, 162 Mass. 113	551
Litchfield v. Cudworth, 15 Pick. 23	460	Mispelhorn v. Farmers' Ins. Co. 58 Md. 473	531
Little v. Greenleaf, 7 Mass. 236	492	Mitchell v. Starbuck, 10 Mass. 5	203
Livingstone v. Taunton, 155 Mass. 363	60	Mohr v. Boston & Albany Railroad, 106 Mass. 67	231
Long v. Colton, 116 Mass. 414	254	Monaghan v. Cox, 155 Mass. 487	274
Lord v. Langdon, 91 Maine, 221	317	Monosiet v. Post, 4 Mass. 582	265
Lovejoy v. Lovett, 124 Mass. 270	569	Monteith v. Nicholson, 2 Keen, 719	190
Lowcock v. Franklin Paper Co. 169 Mass. 318	603	Moody v. Burton, 27 Maine, 427	585
Lyman v. Coolidge, 176 Mass. 7	225	Moore v. Boston, 8 Cush. 274	374
Lynch v. Allyn, 100 Mass. 248	192	— v. Dugan, 179 Mass. 153	364
		— v. Sanford, 151 Mass. 285	67
		Moors v. Wyman, 146 Mass. 60	124
McCann v. Waltham, 163 Mass. 344	8	Morey v. American Loan & Trust Co. 149 Mass. 253	341
McCormick v. Chamberlin, 11 Paige, 543	468	Morgan v. Morse, 13 Gray, 150	277
McDowell v. Sapp, 39 Ohio St. 558	222	Morrissey v. Ingham, 111 Mass. 68	580
McGauley v. Sullivan, 174 Mass. 303	118, 185	Morse v. Martin, 34 Beav. 500	289
McGinn v. Platt, 177 Mass. 125	527	Mount Holly, Lumberton & Medford Turnpike Co. v. Ferree, 2 C. E. Green, 117	353
McIntosh v. Hastings, 156 Mass. 344	448	Mount Hope Cemetery v. Boston, 158 Mass. 509	522
M'Intyre v. Parke, 3 Met. 207	58	Moynihan v. Hills Co. 146 Mass. 586	309
McKamie v. Baskerville, 86 Tenn. 459	221	— v. King's Windsor Cement Co. 168 Mass. 450	192
McLean v. Breithaupt, 12 Ont. App. 883	281	Muldoon v. Lowell, 178 Mass. 134	500
— v. Richardson, 127 Mass. 389	131	Mulhall v. Fallon, 176 Mass. 266	221
McManus v. Weston, 164 Mass. 263	5	Mulrey v. Barrow, 11 Allen, 152	157
McNeil v. Tenth National Bank, 46 N. Y. 325	853	Murdock v. Boston & Albany Railroad, 137 Mass. 293	247
McReynolds v. State, 5 Coldw. 18	222	Murphy v. Adams, 71 Maine, 118	364
Maine Central Institute v. Haskell, 75 Maine, 140	116	Mussey v. Sanborn, 15 Mass. 155	203
Manning v. Fitch, 138 Mass. 273	139	National Granite Bank v. Tyndale, 179 Mass. 390	509
Manter v. Churchill, 127 Mass. 31	408	— v. Whicher, 173 Mass. 517	393
Margraf v. Muir, 57 N. Y. 155	517	National Mechanics' & Traders' Bank v. Eagle Sugar Refinery, 109 Mass. 38	460
Martello, The, 153 U. S. 64	472	National Safe Deposit, Savings & Trust Co. v. Gray, 12 App. D. C. 276	353
Martin v. Meles, 179 Mass. 114	408	National Union Bank v. Copeland, 141 Mass. 257	419
— v. Stubbings, 126 Ill. 387	294	National Waterworks Co. v. Kansas City, 62 Fed. Rep. 853	382
Mason v. Waite, 17 Mass. 560	305	Neal v. Boston, 180 Mass. 518	505
Mathews v. St. Louis & San Francisco Railway, 121 Mo. 298	527	Nealley v. Bradford, 145 Mass. 561	6
May v. Gates, 137 Mass. 389	88	Newburyport Water Co. v. Newburyport, 168 Mass. 541	382
Medbury v. Watson, 6 Met. 246	180	Newcomb v. Boston Protective Department, 146 Mass. 596	359
Menage v. Rosenthal, 175 Mass. 358	254	Newell v. People, 3 Selden, 9	324
Mercer v. Vose, 67 N. Y. 56	279		
Mercer Home, Fisher's appeal, 162 Penn. St. 232	105		
Meriam v. Brown, 128 Mass. 391	378		
Merrick v. Amherst, 12 Allen, 500	574		
— v. Reynolds Engine & Governor Co. 101 Mass. 881	20		
Meyer v. Estes, 164 Mass. 457	531		

Nichols v. Boston, 98 Mass. 39	565	Powell Duffryn Steam Coal Co. v.	
— v. Ela, 124 Mass. 333	123	Taff Vale Railway, L. R. 9 Ch.	
— v. Johnson, 10 Conn. 192	39	831	450
— v. Morse, 100 Mass. 528	131	Pratt v. Bates, 161 Mass. 315	455
— v. Rogers, 189 Mass. 146	590	— v. Weymouth, 147 Mass. 245	6
Nickerson v. Sweet, 135 Mass. 514	508	Presbyterian Church of Albany v.	
Northborough v. County Commis-		Cooper, 112 N. Y. 517	116
sioners, 138 Mass. 263	374	Prescott v. White, 21 Pick. 341	425
Northridge v. Moore, 118 N. Y. 419	517	— v. Williams, 5 Met. 429	425
Norton v. Huxley, 13 Gray, 285	180	Preston v. Boston, 12 Pick. 7	491
Nott v. Sampson Manuf. Co. 142		— v. Knight, 120 Mass. 5	268
Mass. 479	456	— v. Neale, 12 Gray, 222	290
Noyes v. Hale, 137 Mass. 266	494	Price v. Slaughter, 1 Cincinnati S. C.	
Nugent v. Cloon, 117 Mass. 219	227	Rep. 429	222
Nye v. Storer, 168 Mass. 63	590	Prickett v. Badger, 1 C. B. (N. S.)	
		296	481
Oakes, Matter of, 8 Law Rep. 122	133	Prince v. Crocker, 166 Mass. 847	241
O'Herron v. Gray, 168 Mass. 573	353	— v. Lynn, 149 Mass. 193	9
O'Laughlin v. Boston & Maine		Pritchard v. Norton, 106 U. S. 124	518
Railroad, 164 Mass. 139	246	Proctor v. Stone, 1 Allen, 193	172
Osborn v. Danvers, 6 Pick. 98	491	Providence, The, 98 Fed. Rep. 133	472
Owen v. Neveau, 128 Mass. 427	461	Pumpelly v. Phelps, 40 N. Y. 59	517
		Purple v. Greenfield, 138 Mass. 1	354
		Putnam v. Glidden, 159 Mass. 47	259
Packard v. Marshall, 188 Mass. 301	227	Quinlan v. Providence Washington	
Paine v. Woods, 108 Mass. 100	460	Ins. Co. 138 N. Y. 856	532
Parker v. Abbott, 130 Mass. 25	460		
— v. Baxter, 2 Gray, 185	48	Railway Passenger Assurance Co.	
— v. Gerard, Amb. 236	208	v. Burwell, 44 Ind. 460	532
— v. Nickerson, 137 Mass. 487	123	Raworth v. Parker, 2 K. & J. 163	418
Partridge v. Bank of England, 9		Reed v. Cumberland Ins. Co. 9 Stew.	
Q. B. 396	358	393	468
Payson v. Burnham, 141 Mass. 547	399	Reeve v. Dennett, 145 Mass. 23	300
Pearce v. Brooks, L. R. 1 Ex. 213	58	Reynolds v. Boston Rubber Co. 160	
Pearth v. Marriott, 22 Ch. D. 182	554	Mass. 240	254
Peck v. Clark, 142 Mass. 436	254	— v. Merchants' Woolen Co.	
Pence v. Arbuckle, 22 Minn. 417	358	168 Mass. 601	812
Pennsylvania Railroad's appeal, 86		— v. State, 5 Coldw. 18	222
Penn. St. 80	353	— v. Waterville, 92 Maine, 292	324
Pennsylvania, The, 19 Wall. 125	472	Rice v. Dwight Manuf. Co. 2 Cush.	
People v. Board of Health, 140		80	412
N. Y. 1	387	— v. Moorehouse, 150 Mass.	
Perkins v. Lockwood, 100 Mass.		482	317
249	119	Rich v. Tuckerman, 121 Mass. 222	549
— v. Stickney, 182 Mass. 217	605	Richards v. Holmes, 18 How. 143	88
Peters v. McKeon, 4 Denio. 546	517	Ricker v. Brooks, 155 Mass. 400	495
— v. Peters, 8 Cush. 529	455	Rideout v. Knox, 148 Mass. 368	317
Pettingell v. Chelsea, 161 Mass. 868	6	Roche v. Smith, 176 Mass. 595	518
Phelps v. Bates, 54 Conn. 11	190	Rodman v. Guilford, 112 Mass. 405	131
Phillips v. Cornell, 163 Mass. 546	277	Roehl v. Haumesser, 114 Ind. 311	39
— v. Hoyle, 4 Gray, 568	580	Rogers v. Mayer, 151 Mass. 279	267
— v. Vose, 81 Maine, 134	364	Rose v. Mitchell, 6 Col. 102	58
Phosphate Sewage Co. v. Molleson,		Ross v. Boston & Worcester Rail-	
5 Ct. of Sess. Cas. (4th Ser.) 1125	124	road, 6 Allen, 87	526
Pierce v. Eddy, 152 Mass. 594	494	Rowell v. Railroad, 57 N. H. 132	527
— v. Prescott, 128 Mass. 140	455	Ruchinsky v. French, 168 Mass. 68	603
Pitkin v. Springfield, 112 Mass. 509	67	Russell v. Tillotson, 140 Mass. 201	604
Polson v. Stewart, 167 Mass. 211	518	Ryder v. Loomis, 161 Mass. 161	39
Polydore v. Prince, Ware, 402	222		
Porter v. Ritch, 70 Conn. 235	184	St. John v. Eastern Railroad, 1 Allen,	
Portland Bank v. Apthorp, 12 Mass.		544	249
252	19	St. Mary Magdalen v. Attorney	
Potter v. Duffield, L. R. 18 Eq. 4	39	General, 6 H. L. Cas. 189	105
— v. Wheeler, 13 Mass. 504	204	Salem v. Eastern Railroad, 98 Mass.	
Pountain, In re, 37 Ch. D. 609	133	431	887

Salem Iron Factory Co. v. Danvers, 10 Mass. 514	492	Standard American Publishing Co. v. Methodist Book Concern, 83 App. Div. (N. Y.) 409	591
Sampson v. Boston, 181 Mass. 288	6	Stanley v. Colt, 5 Wall. 119	105
Sanborn v. Chamberlin, 101 Mass. 409	482	Steele v. Curle, 4 Dana, 381	58
— v. Flagler, 9 Allen, 474	89	— v. Municipal Signal Co. 160 Mass. 36	241
Saunders v. Bennett, 159 Mass. 48	600	Stetson v. Kempton, 18 Mass. 272	491
— v. Lowell, 131 Mass. 387	378	Stevens v. Tuite, 104 Mass. 328	73
Sawyer v. Harmon, 136 Mass. 414	461	Stewart v. Platt, 101 U. S. 781	124
Schayer v. Commonwealth Loan Co. 163 Mass. 822	186	Stoddard v. Winchester, 157 Mass. 567	30
Schutt v. Missionary Society, 14 Stew. 115	39	Stoughton v. Baker, 4 Mass. 522	379
Scollans v. Rollins, 178 Mass. 275	352	Stowe v. Heywood, 7 Allen, 118	580
Scott v. Boston & New Orleans Steamship Co. 106 Mass. 468	139	Stratton v. Edwards, 174 Mass. 374	196
— v. Raub, 88 Va. 721	220	Strong v. Manufacturers' Ins. Co. 10 Pick. 40	438
Scovill v. Thayer, 105 U. S. 143	21	— v. Strong, 9 Cush. 560	266
Seymour v. Newton, 105 Mass. 272	231	Stuart v. West End Street Railway, 163 Mass. 391	603
Shattuck v. Wall, 174 Mass. 167	228	Sullivan v. Arcand, 165 Mass. 364	448
Shaw v. Paine, 12 Allen, 293	455	— v. Old Colony Railroad, 148 Mass. 119	214
— v. Spencer, 100 Mass. 882	353	Sumner v. Dorchester Parish, 4 Pick. 361	492
Shepard v. Creamer, 160 Mass. 490	505	Sutton v. Toomer, 7 B. & C. 416	508
Sheppard v. Akers, 1 Tenn. Ch. 826	468	Swain v. Security Live Stock Ins. Co. 165 Mass. 821	532
Sheridan v. Salem, 148 Mass. 196	60	Sweet v. Boston, 18 Pick. 128	554
Sherman v. Congregational Home Missionary Society, 176 Mass. 849	105	Swift River Co. v. Fitchburg Rail- road, 169 Mass. 326	189
Sherwin v. Fletcher, 168 Mass. 413	116	Sykes v. Meacham, 103 Mass. 285	840
Shoemaker v. Mechanics' Bank, 59 Penn. St. 79	588	Symms v. Schotten, 35 Kans. 310	232
Shove v. Dow, 18 Mass. 529	461		
Sibbald v. Bethlehem Iron Co. 83 N. Y. 376	481	Taggart v. Fall River, 170 Mass. 325	7
Skilton v. Roberts, 129 Mass. 306	51	Tainter v. Clark, 18 Met. 220	227
Slark v. Dakyns, L. R. 10 Ch. 85	289	Taunton v. Taylor, 116 Mass. 254	387
Smith v. Abington Savings Bank, 105 Mass. 285	25	Terry v. Munger, 121 N. Y. 126	294
— v. Austin, 49 Mich. 286	274	Tetley v. Shand, 20 W. R. 206	146
— v. Dunham, 8 Pick. 246	508	Texas & Pacific Railway v. Mar- shall, 136 U. S. 398	450
— v. Edwards, 156 Mass. 221	147	Thayer v. Mann, 19 Pick. 535	510
— v. Emerson, 126 Mass. 169	158	Tilton v. Boston & Albany Rail- road, 169 Mass. 253	545
— v. Howard, 178 Mass. 88	125	Tindley v. Salem, 137 Mass. 171	6
— v. McDowell, 148 Ill. 51	468	Topham v. Duke of Portland, 32 L. J. Ch. 257	289
— v. Morrison, 22 Pick. 430	15	Townsend v. Nickerson Wharf Co. 117 Mass. 501	139
— v. Morse, 148 Mass. 407	317	Tracy v. Talmage, 4 Kernan, 162	58
— v. Newburyport Ins. Co. 4 Mass. 668	531	Trask v. State Fire & Marine Ins. Co. 29 Penn. St. 198	532
— v. Putnam, 8 Pick. 221	438	Treadwell v. Salisbury Manuf. Co. 7 Gray, 393	68
— v. Rice, 11 Mass. 507	455	Treanor v. Donahoe, 9 Cush. 228	580
— v. Smith, 157 Mass. 389	513	Trecy v. Jeffs, 149 Mass. 211	119
— v. Valence, 1 Rep. Ch. 90	67	Tudor v. Peck, 4 Mass. 242	268
Smith & Dove Manuf. Co. v. Trav- ellers' Ins. Co. 171 Mass. 357	531	Tuttle v. Holland, 48 Vt. 542	58
Snow v. Chatfield, 11 Gray, 12	249		
Sortwell v. Hughes, 1 Curt. C. C. 244	58	Ufford v. Spaulding, 156 Mass. 65	579
Spade v. Lynn & Boston Railroad, 172 Mass. 488	214	Union Credit Bank v. Mersey Docks & Harbour Board, [1899] 2 Q. B. 205	353
Spaulding v. Arlington, 126 Mass. 492	377	Union Institution for Savings v. Boston, 129 Mass. 82	50
— v. Smith, 162 Mass. 543	317		
Spooner v. Cummings, 151 Mass. 313	41		
— v. Holmes, 102 Mass. 603	353		

Union Mutual Association v. Montgomery, 70 Mich. 587	294	White v. Wilson, 1 Drew. 298	289
United States v. McLaughlin, 24 Fed. Rep. 823	468	Whitehurst v. North Carolina Mutual Ins. Co. 7 Jones (N. C.) 433	582
Vinton v. Middlesex Railroad, 11 Allen, 304	214	Whiteside v. Brawley, 152 Mass. 138	894
Vogle v. Ripper, 34 Ill. 100	509	Whiting v. Burkhardt, 178 Mass. 535	123
Walcott v. Swampscott, 1 Allen, 101	5	—— v. Sullivan, 7 Mass. 107	259
Walker v. Mayo, 143 Mass. 42	509	Whitmore v. Turquand, 8 DeG., F. & J. 107	418
—— v. Tirrell, 101 Mass. 257	480	—— v. ———, 1 Johns. & Hem. 444	418
—— v. Walker, 175 Mass. 349	37	Whitney v. Cook, 5 Mass. 189	266
Wall v. Platt, 169 Mass. 398	527	Whittenton Manuf. Co. v. Staples, 164 Mass. 819	254
Wallace v. Lark, 12 So. Car. 576	58	Wiggin v. Heywood, 118 Mass. 514	50
Walters v. Brown, 15 Md. 285	588	—— v. Suffolk Ins. Co. 18 Pick. 145	286
Waltham Bank v. Wright, 8 Allen, 121	340	Wild v. Boston & Maine Railroad, 171 Mass. 245	527
Ward v. Fuller, 15 Pick. 185	459	Williams v. Bacon, 2 Gray, 887	481
Warren v. Spencer Water Co. 143 Mass. 9	374	—— v. Carwardine, 4 B. & Ad. 621	117
Waterman Co. v. Waterman, 27 App. Div. (N. Y.) 133	591	—— v. Weinbaum, 178 Mass. 238	158,
Way v. Lewis, 115 Mass. 26	107		364
Webb v. Sadler, L. R. 8 Ch. 419	289	Williamson v. Farwell, 35 Ch. D. 128	289
Webber v. Donnelly, 38 Mich. 469	58	Wilson v. Massachusetts Cotton Mills, 169 Mass. 67	603
Webster v. Munger, 8 Gray, 584	58	—— v. Trenton, 16 L. R. A. 200	588
Weeks v. Hobson, 150 Mass. 377	105	Winchester v. Charter, 12 Allen, 606	196
Weir v. Hudnut, 115 Ind. 525	407	Windett v. Union Ins. Co. 144 U. S. 581	51
Welch v. Brimmer, 169 Mass. 204	189	Windram v. French, 151 Mass. 547	117,
Wellington v. Apthorp, 145 Mass. 69	39		123
—— v. Small, 3 Cush. 145	299, 585	Winsor v. McLellan, 2 Story, 492	124
Wells v. Child, 12 Allen, 333	340	Winthrop v. Soule, 175 Mass. 400	448
—— v. Prince, 15 Gray, 562	181	Wood's appeal, 92 Penn. St. 379	353
Wemyss v. White, 159 Mass. 484	227	Wood v. Westborough, 140 Mass. 408	54
Wendell, Matter of, 1 Johns. Ch. 600	183	Woods v. Gilson, 178 Mass. 511	550
West v. Chicago & Northwestern Railroad, 77 Iowa, 654	527	Worcester v. Boston, 179 Mass. 41	76
—— v. Platt, 127 Mass. 367	412	Worcester County v. Ashworth, 160 Mass. 186	583
Western v. MacDermot, L. R. 2 Ch. 72	400	Worcester County Bank v. Dorchester & Milton Bank, 10 Cush. 488	353
—— v. ———, L. R. 1 Eq 499	400	Wyer v. Dorchester & Milton Bank, 11 Cush. 51	353
Wheeler v. Guild, 20 Pick. 545	353	Wylie v. Cotter, 170 Mass. 356	579
Whitcomb v. Taylor, 122 Mass. 243	189		
White v. Bigelow, 154 Mass. 593	37		
—— v. Duggan, 140 Mass. 18	353		
—— v. Phillipaton, 10 Met. 108	7		

CASES
ARGUED AND DETERMINED
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

ELMER E. BUTMAN *vs.* CITY OF NEWTON.

Middlesex. November 21, 1900. — May 22, 1901.

Present: HOLMES, C. J., KNOWLTON, BARKER, HAMMOND, & LORING, JJ.

Municipal Corporations, Officers and Agents. Negligence.

If a city or town, instead of leaving the repair of its ways to the public officers designated by the statutes, undertakes to make the repairs by its own agents, it is liable for injuries caused by their negligence.

The city of Newton by ordinance provided, that, under the supervision of a joint standing committee of the common council and board of aldermen, the superintendent of streets should have the charge of the making, widening and altering of streets and ways. *Held*, that this made the superintendent of streets the agent of the city, and that the city was liable for an injury caused by the negligence of workmen under his direction operating a stone crusher to prepare material to be used in constructing a new street.

When city authorities are repairing or constructing a street, one who drives between wooden horses bearing the sign "No passing through," which have been placed across the way or are temporarily standing lengthwise at the side of the road in such a position as plainly to indicate that it is not open to travel, does so at his own risk. In this case, however, the evidence was conflicting and would justify a finding that the part of the way on which the plaintiff was driving was open to travel.

To dump a load of stone on the wooden platform of a stone crusher and start up the engine of the crusher letting off steam just as a horse which is being driven

on a roadway twenty-five feet away and in plain sight is opposite to it, may be found to be a negligent act on the part of the agents of a city operating the crusher.

TORT to recover for injury to the plaintiff and his carriage from his horse being frightened by the dumping of a load of stone on the wooden platform of a stone crusher and the letting off of steam from the engine of the crusher by the agents and servants of the defendant while operating the crusher near Commonwealth Avenue in Newton on which the plaintiff was driving. Writ dated March 19, 1898.

At the trial in the Superior Court, before *Dewey, J.*, the following facts appeared:

Commonwealth Avenue between Auburn Street and Charles River was laid out by the city of Newton April 30, 1895. Appropriations were made for its construction which was proceeding at the time of the injury to the plaintiff.

Charles W. Ross was at the time superintendent of streets of the defendant. As such superintendent he had charge of the apparatus used in the construction of the streets and employed and discharged the men.

The city of Newton was incorporated by St. 1873, c. 326.

Section 14 authorized the city council to elect among other officers a superintendent of streets. St. 1882, c. 210, amending the charter, by § 7 authorized the city council "to establish by ordinance such offices as may be necessary for any municipal purposes." Thereafter by Ordinance 16 of 1883 the city established the office of superintendent of streets, and defined the duties of the superintendent.

The ordinances were revised in 1894, and chapter 11 contained the following provisions:

"Sect. 1. The superintendent of streets shall, under the direction of the highway surveyors, have the general care and charge of highways and streets, of sidewalks and bridges, and cause them to be kept in good repair. He shall see that all nuisances and obstructions are removed, or give notice thereof to the surveyors.

"Sect. 2. Whenever any highway, street, sidewalk or bridge is unsafe for travel, the superintendent of streets shall erect suitable fences to prevent travel upon such parts thereof as are

unsafe, and shall cause such places to be sufficiently lighted at night.

"Sect. 3. Under direction of the joint standing committee on highways, the superintendent of streets shall have supervision of the construction and repair of all drains, except as otherwise provided by ordinance; the making, widening, and altering of streets and ways, and the care of shade trees therein. He shall have charge of the city teams and stables, and disposing of manure from same, other than those used by the fire and police departments, and shall make all necessary arrangements for cleaning the streets." *

The joint standing committee referred to in the section last quoted was made up of members of the city council.

Commonwealth Avenue as laid out included parts of former streets of the city of Newton and other land taken for the purposes of the street. The accident to the plaintiff occurred at a point in the street included in an old street known as Ash Street, but the crusher was not in this part of the street. The evidence showed that the plaintiff's horse was frightened by the dumping of stone upon the platform of a stone crusher adjacent to the travelled part of this former street known as Ash Street. The stone crusher was a machine used for crushing and preparing stones for the construction and repair of streets. It had a wooden platform upon which the stone was dumped before it was thrown into the hopper of the crusher. The crusher was operated by a steam engine with the usual boilers and apparatus connected with the crusher by means of pulleys and bands. It was preparing material to be used in constructing the new street.

The accident occurred upon the ninth day of May, 1896, between nine and ten o'clock in the forenoon. At that time the road was in process of construction although it was passable in the direction which the plaintiff took. This part of the road was open to travel. There were piles of stone and material about, machines for construction, men, horses and carts, and other evidence that the road was being constructed. At the points of entrance of various streets to Commonwealth Avenue

* For the provisions relating to the street department in the present charter of the city of Newton, see St. 1897, c. 283, §§ 24, 25.

as constructed wooden horses had been placed, upon which were signs "No passing through." At the time of the accident some of these signs had been placed at the side of the road lengthwise, so as not to obstruct travel, and some were in adjoining fields but were plainly visible. The plaintiff had been over the street while in process of construction a number of times before the accident, and had seen the stone crusher and knew it was there. Commonwealth Avenue was laid out with two roadways and a reserved space between the roadways, and the roadway upon which the plaintiff was travelling was about thirty-six feet in width. The wooden platform of the crusher extended back twenty-five feet from this travelled portion of the street. The roadway for three hundred feet in the direction from which the plaintiff was coming was straight and all objects were visible thereon except that the stone crusher was partly hidden by trees until one was near it.

There was evidence that the crusher was not in operation when the plaintiff started to drive by but was started up just as his horse was opposite to it and in plain sight of the men who dumped the stone. When the plaintiff's horse was opposite or just beyond the crusher, the men employed upon it, in the work of preparing stone for the construction of the street, dumped upon the wooden platform a cartload of stone, the noise from which, together with escaping steam, frightened the plaintiff's horse. He ran away, threw the plaintiff out and injured him and the horse and the carriage.

There was no evidence that the committee of the city council of the city of Newton took any active part in the construction or direction of the construction of Commonwealth Avenue. The superintendent of streets, in answer to questions upon cross-examination by the plaintiff's attorney, stated that the committee had visited the work upon the street where this crusher was, but had given him no directions. The evidence also showed that the stone crusher was put up under the direction of the superintendent of streets.

The defendant asked the judge to instruct the jury, that upon the evidence the plaintiff was not entitled to maintain his action, that the city was not liable for the acts of the superintendent of streets either in placing or operating the stone crusher, that

the superintendent of streets was a public officer for whose acts and the acts of those in his employ the city was not liable, that the evidence showed that the plaintiff was not in the exercise of due care, that if the way was in process of construction and the plaintiff had knowledge thereof and proceeded nevertheless to travel thereon then he was not entitled to recover in this action, and that there was no evidence of negligence on the part of the defendant or its servants or agents.

The judge refused to give these instructions and gave other instructions which are not now material, and the defendant excepted.

The jury returned a verdict for the plaintiff in the sum of \$925, and thereafter the judge reported the case for the consideration of this court. If the refusal to give the rulings requested was correct, judgment was to be entered upon the verdict; otherwise, the verdict was to be set aside and a new trial ordered.

W. S. Slocum, for the defendant.

G. L. Mayberry, for the plaintiff.

LOBING, J. In this case, the plaintiff's horse was frightened by some person or persons dumping a load of stone upon the wooden platform of a stone crusher, "the noise from which, together with escaping steam, frightened the plaintiff's horse and he ran away," and caused the injury sued for. The employees who dumped the stone, and who had charge of the steam engine by which the stone crusher was run, were acting under the superintendent of streets, and were engaged in constructing Commonwealth Avenue.

1. The defendant's first contention is that the act complained of is that of a public officer for which the city is not liable.

It is established on the one hand that a town is not liable for injuries caused to a person by the negligence of those engaged in repairing a way within its boundaries, if the work is done by or under a surveyor of highways; *Walcott v. Swampscott*, 1 Allen, 101; *Hennessey v. New Bedford*, 153 Mass. 260; or by a road commissioner; *McManus v. Weston*, 164 Mass. 263. And on the other hand, it is also established that if a town, in place of leaving the repair of its ways to the surveyor of highways, or to road commissioners, who are the public officers designated by

the statutes to see that the highways are kept in a safe condition, (Pub. Sts. c. 52, § 3; *Nealley v. Bradford*, 145 Mass. 561, 563, 564; *Pratt v. Weymouth*, 147 Mass. 245, 255; *Blanchard v. Ayer*, 148 Mass. 174, 176;) undertakes to make the repairs by its own agents, it is liable for injuries caused through their negligence. *Hawkes v. Charlemont*, 107 Mass. 414. *Deane v. Randolph*, 132 Mass. 475. *Tindley v. Salem*, 137 Mass. 171, 172, 173. *Pratt v. Weymouth*, 147 Mass. 245, 254. *Brookfield v. Reed*, 152 Mass. 568. *Collins v. Greenfield*, 172 Mass. 78, 81.

The foundation of the general rule is, that the duty of repairing the public highways is the performance of a public duty imposed upon all towns alike, from the performance of which a town derives no special advantage in its corporate capacity. The exemption of the town, in those cases where it is exempt under the general rule, does not rest upon the fact, that the town has no control over the highway surveyor or the road commissioner; the rule applies in many cases where the town has full control over the officials in question; for example, it has been held to include the case of an injury caused by the negligence of firemen in hauling a hose reel to extinguish a fire, where the fire department in question was established by the town under a special act in place of leaving the matter to firewards, and where the statute gave to the engineer and other officers of the fire department of the town the authority and duties of firewards. *Hafford v. New Bedford*, 16 Gray, 297. *Fisher v. Boston*, 104 Mass. 87. And see *Buttrick v. Lowell*, 1 Allen, 172; *Howard v. Worcester*, 153 Mass. 426; *Sampson v. Boston*, 161 Mass. 288; *Pettingell v. Chelsea*, 161 Mass. 368. The general rule, as we have said, includes all cases where the town is performing a public duty, imposed upon all towns alike, from the performance of which it derives no special advantage in its corporate capacity.

A town which undertakes to make repairs on ways within its limits, by its own agents, is an exception to the general rule. In that case it has a pecuniary interest in the matter by reason of its statutory liability for a defect in the way; this distinction is pointed out and the whole subject is so exhaustively stated by C. Allen, J., in *Tindley v. Salem*, 137 Mass. 171, 172, 173, that it is not necessary to restate the reasons at length in this case. It

may be added, however, to what was said there, that while a town has, by statute, a remedy over against the surveyor of highways, through whose fault or neglect the way came to be in a defective condition, in a case where it has been fined for allowing a way to be out of repair, (see Pub. Sts. c. 27, § 128,) it has no remedy over to recover the amount of a judgment against it for injuries suffered by a traveller from a defect in the way caused by the negligence of the surveyor. *White v. Phillipston*, 10 Met. 108.

It appears from the report in the case at bar that Commonwealth Avenue, including that part of it on which the plaintiff was driving, when the accident complained of occurred, was laid out by the city of Newton. We assume, therefore, that it was a town way and was laid out under § 24 of the charter of the defendant city. St. 1873, c. 326. The laying out of a public way is the performance of a public duty imposed upon all towns and cities alike, from the performance of which they derive no special advantage in their corporate capacity, and is not the institution by the city of work for its own particular use and benefit. The defendant city, therefore, is not liable in this case, because it had directed work to be done for its benefit, in which case it might be under some circumstances liable for injury caused by negligence in carrying it into effect.

The expense of constructing a town way is, by the provision of our laws, to be borne by the town in which it is laid out. Pub. Sts. c. 52, § 1; c. 49, §§ 68, 75. The act of the defendant city in making due appropriations for the construction of the way did not make it liable for this accident; that act also is the performance of a public duty within the rule.

The making of public ways is not only committed to the surveyors of highways or road commissioners, as is the matter of repairing them, but both matters are covered by one and the same sections of the Public Statutes. See Pub. Sts. c. 52, §§ 3, 13. Where a city or town pursues the course thus provided for, it is not liable for injuries caused by the negligence of those engaged in constructing a way. *Taggart v. Fall River*, 170 Mass. 325. This rule was applied in *Jensen v. Waltham*, 166 Mass. 344, where a street was being constructed by a board of street commissioners the existence of which was provided for

in the charter of the defendant city, (St. 1884, c. 309, § 23,) and who were invested by an ordinance of the city with the duty of highway surveyors. See *McCann v. Waltham*, 163 Mass. 344, 345.

In the case at bar the city of Newton did not pursue the course set forth in the general laws for making the highways within its limits, but on the contrary, it provided by its ordinances that "Under direction of the joint standing committee on highways, the superintendent of streets shall have supervision of . . . the making, widening, and altering of streets and ways." Newton Rev. Ord. 1894, c. 11, § 3. A "joint standing committee" is a committee of the city council, made up of the common council and the board of aldermen. (See the charter of the defendant city, St. 1882, c. 210, § 2, amending St. 1873, c. 326, § 2.) In other words, the defendant city, in place of leaving the ways within its limits to be constructed in accordance with the provisions of Pub. Sts. c. 52, § 3, has preferred, having regard to its liability to travellers for defects in the way, to leave the construction of them to its own superintendent of streets, acting under the direction of the joint committee of its aldermen and common council. That makes the superintendent of streets the agent of the defendant city in this connection, and the case falls within *Hawks v. Charlemont*, 107 Mass. 414; *Deane v. Randolph*, 132 Mass. 475; *Tindley v. Salem*, 137 Mass. 171, 172, 173; *Pratt v. Weymouth*, 147 Mass. 245, 254; *Brookfield v. Reed*, 152 Mass. 568; *Collins v. Greenfield*, 172 Mass. 78, 81, cited above.

The defendant relies on the case of *Barney v. Lowell*, 98 Mass. 570. In that case, the injury complained of was caused by the negligence of the driver of a cart in which stone was being hauled from a stone crusher for the purpose of macadamizing a street, which was being repaired by the superintendent of streets. It appeared in the report in that case, that the ordinances of the defendant city provided for the appointment of a superintendent of streets, who should have charge of the repairs of streets "under the direction of the highway surveyors or joint committee on streets." It also appeared that the repairs were being made "under the direction of the committee on streets of the board of aldermen." But a pro-

vision in an ordinance that the surveyor of highways should act under the direction of the mayor and aldermen does not make him the agent of the city, *Prince v. Lynn*, 149 Mass. 198, and it seems to have been assumed that the superintendent of streets in that case was in fact acting "under the direction of the highway surveyors," as it was provided in the ordinance of the defendant city he might do, and not under the direction "of the joint committee on streets," which it is also provided in that ordinance could be done.

2. The defendant's second contention is that the plaintiff was driving on Commonwealth Avenue at his peril, within the rule laid down in *Jones v. Collins*, 177 Mass. 444. But the evidence on this point was conflicting. On the one hand, there was testimony that "Commonwealth Avenue was laid out with two roadways and a reserved space between the roadways"; also that at the time of the accident "this part of the road" on which the plaintiff was driving "was open to travel." On the other hand, there was evidence that "there were piles of stone and material about, machines for construction, men, horses and carts, and other evidence that the road was being constructed"; that "at the points of entrance of various streets to Commonwealth Avenue as constructed wooden horses had been placed, upon which were signs stating 'No passing through'"; that "at the time of the accident some of these signs had been placed at the side of the road lengthwise, so as not to obstruct travel, and some were in adjoining fields but were plainly visible." We are unable to determine from these conflicting statements what the situation really was as to the part of the road on which the plaintiff was driving. If one of the two roadways had been thrown "open to travel" and the plaintiff was driving on it, he was there by right, and the defendant is liable for its negligence, if it was negligent in operating the stone crusher. On the other hand, if the plaintiff drove on to a roadway between wooden horses which had been placed across the way, and on which were signs stating "No passing through," or even if he drove on to a roadway on which such signs had been placed and which were temporarily standing at the side of the road lengthwise in such a position as plainly to indicate that it was not open for travel, he went at his own risk. The

only exception covering this point is that to the refusal to order a verdict for the defendant. As there was evidence on which the jury, under proper instructions, could have found for the plaintiff, this exception is not well taken.

3. The defendant's third contention is that there was no evidence of negligence on the part of the defendant. But we think it might be found to be an act of negligence to dump a load of stone on the wooden platform of a stone crusher and let off steam just as a horse which is being driven along a roadway only twenty-five feet away is opposite to it, and which is "in plain sight of the men who dumped the stone." The case does not come within the cases relied on by the defendant, *Howard v. Union Freight Railroad*, 156 Mass. 159, *Lamb v. Old Colony Railroad*, 140 Mass. 79, where horses have been frightened by the escape of steam incident to the prudent running of its trains by a steam railroad which has been given the right to operate its road adjoining a highway.

In accordance with the terms of the report, there must be

Judgment for the plaintiff.

ALPHEUS SANFORD vs. HAMPDEN PAINT AND CHEMICAL COMPANY.

Suffolk. November 23, 1900. — May 22, 1901.

Present: HOLMES, C. J., KNOWLTON, BARKER, HAMMOND, & LORING, JJ.

Insurance, Fire, Mutual companies, Assessments. Limitations, Statute of, Rule of construction.

The receiver of an insolvent mutual fire insurance company filed a petition to levy an assessment on policy holders including the defendant, a former policy holder whose policy had expired more than one year but less than two years before he was notified of the assessment. When the petition for an assessment was filed the provision of St. 1894, c. 522, § 48, was in force, that no assessment should be valid against a person who had not been notified thereof within two years after the expiration or cancellation of his policy. While the matter of the assessment was before an auditor, St. 1897, c. 197, § 2 was passed amending this provision by changing the words "two years" to "one year." *Held*, that the change in the limitation could not have been intended to apply to pending assessments and that this assessment could be enforced.

It is the uniform rule of construction for statutes of limitation, that a statute short-

ening the period for enforcing a liability is not held applicable where the result would be to deprive one of the right to enforce a claim without a reasonable time to act before being barred. Per HAMMOND, J.

CONTRACT by the receiver of the Melrose Mutual Fire Insurance Company to enforce an assessment of \$162.44 on two policies of that company formerly held by the defendant which expired respectively on August 24 and September 3, 1895. Writ dated January 17, 1898.

The case was heard in the Superior Court on an agreed statement of facts by *Fessenden, J.*, who found for the plaintiff and assessed the damages in the amount of \$183.23 and ordered judgment for that amount. From this judgment the defendant appealed.

The agreed facts were as follows: The plaintiff was appointed receiver of the Melrose Mutual Fire Insurance Company by decree of the Supreme Judicial Court, on November 26, 1895. On January 22, 1897, the receiver petitioned the court for an order to levy an assessment upon the policy holders of the company. In response to his petition the court, on February 19, 1897, appointed James Russell Reed, Esquire, of Boston, auditor, to examine the books of the company and report to the court. In compliance with the decree appointing him, the auditor, on February 24, 1897, mailed notices to the policy holders of a public hearing to be had before him on March 10, 1897, at No. 68 Devonshire Street, in Boston, and duly published notice of the hearing in the newspapers. The hearing was had and was continued from time to time, and on March 31, 1897, the auditor filed his report with the court, authorizing an assessment of \$43,420.77. On April 7, 1897, an order of notice was issued by the court on the auditor's report, and the order was duly returned to court. On April 23, 1897, the court decreed that an assessment of \$40,420.77 be levied against the policy holders, to be voted by the directors of the company. On May 7, 1897, the directors of the company, in compliance with the decree, voted an assessment of \$40,420.77. A certified copy of the vote was filed with the court on May 12, 1897. On the same day, the receiver petitioned the court for a ratification of the assessment, and on that day the court issued a decree ratifying the assessment. On July 27, 1897, the receiver

petitioned the court to confirm a supplemental assessment consisting of the itemized assessment against each policy holder in the company, and on that day the court issued an order of notice on the petition. On August 18, 1897, the court ratified the supplemental assessment.

On May 20, 1897, the receiver mailed notices to all the policy holders, including the defendant, calling attention to the amount of the assessment levied against each of them and demanding payment thereof. By St. 1897, c. 197, § 2, approved March 24, 1897, the Legislature amended the third paragraph of St. 1894, c. 522, § 48, so as to read as follows: "No assessment shall be valid against a person who has not been duly notified thereof within one year after the expiration or cancellation of his policy." The section amended required notification within two years.

The defendant, the Hampden Paint and Chemical Company, had a policy in the Melrose Mutual Fire Insurance Company that expired on September 3, 1895, and another one that expired on August 24, 1895. These policies were assessed by the receiver and this action was brought for the collection of the assessment.

W. B. Stone, for the defendant, submitted the case on a brief.

T. M. Vinson, for the plaintiff.

HAMMOND, J. The sole question is, whether St. 1897, c. 197, § 2, is applicable to the assessment for the collection of which this action is brought. Unless it is, the plaintiff is entitled to judgment on the finding.

In November, 1895, the plaintiff was duly appointed a receiver of the Melrose Mutual Fire Insurance Company in a suit in equity instituted, for the purpose of winding up the affairs of the company, upon the ground that its condition was such as to render its further proceedings hazardous to the public and to its policy holders; and, on January 22, 1897, he, as such receiver, filed in court a petition setting forth that the liabilities of the company greatly exceeded its assets, and asking for an order to levy an assessment upon the policy holders. Upon the petition, the court, on February 19, 1897, appointed an auditor to hear all parties interested, and to report upon the correctness of the proposed assessment and all matters connected therewith, either of law or of fact. The auditor notified the policy holders to appear

at a public hearing to be had before him on March 10, 1897; and on that day the hearing was begun, and was continued from time to time until, on March 31, 1897, the auditor filed his report; whereupon, such proceedings were had as that, on May 7, 1897, an assessment was voted by the directors of the company in compliance with an order from the court, and on May 12, 1897, was duly ratified by the court; and, on May 20, notice thereof was given to the policy holders, including the defendant. The defendant was assessed upon two policies, one of which had expired August 24, 1895, and the other on September 3, 1895. St. 1897, c. 197, was passed March 24, 1897, and took effect on its passage.

Upon an examination of the foregoing dates, it is seen that the policies of the defendant had both expired more than one year before the receiver filed his petition for an assessment, but less than two years before the assessment was confirmed by the court, and notice thereof given to the defendant, and that the statute in question was passed while the auditor was hearing the case.

As a policy holder, the defendant became a member of the insurance company, and, as such, liable to an assessment for the payment of all just claims accruing against it during the continuance of the policies, or either of them; and the liability continued, notwithstanding the expiration of the policies. This liability was imposed by the statute upon the policy holder for the benefit of the other policy holders, and other creditors of the company. It was a part of the fund to which each of the other policy holders was entitled to resort for the payment of his own loss as well as for help in paying the loss of another. This obligation to contribute, if necessary, to pay the loss sustained by any other member, although created by statute, was of a contractual nature, and was a part of the contract between each stockholder and the company.

At the time the insurance company was enjoined from the further prosecution of its business and the receiver was appointed to wind up its affairs, the law was that no assessment should be held valid against a policy holder unless he was duly notified thereof within two years of the expiration or cancellation of his policy. St. 1894, c. 522, § 48. Under this statute,

the court, at a time well within two years from the expiration of the defendant's policies, commenced proceedings with a view to levy an assessment, and, while the auditor was engaged in hearing the case, St. 1897, c. 197, was passed. The second section, being the one under consideration, provides that no assessment "shall be valid against a person who has not been duly notified thereof within one year after the expiration or cancellation of his policy." The only change it made in the law was the substitution of one year for two years as the time within which the member should be notified of the assessment. The statute took effect upon its passage. It is in substance a statute of limitations. It shortens the time within which a statute liability of a contractual nature may be enforced, and it provides no time within which the liability which has existed for more than one year and less than two can be enforced. If applicable to this case, the company having the right to enforce such a liability, and relying upon the law that it may enforce the same at any time within two years, suddenly and without previous warning is deprived of all right to enforce it. In such a case, the statute does more than merely set a time within which the existing liability shall be enforced, or the right to enforce it be barred. It destroys the liability. Thus interpreted, it is not a statute of limitations, but a denial of justice.

Such an interpretation is not consistent with the general rule by which statutes of limitations are to be construed. Whenever the time within which the right to enforce a liability is shortened by a statute, the uniform construction is to hold it not applicable where the result would be to deprive one of the right to enforce a claim without a reasonable time to act before being barred.

As stated by Shaw, C. J., in *Brigham v. Bigelow*, 12 Met. 268, 273, "If, indeed, the legislature should declare that a period already elapsed should bar an action, this would be, under color of regulating, arbitrarily to take away all remedy, and in effect to destroy the contract, within its jurisdiction, and would be a mere abuse of power, not to be anticipated from any legislature." Although this language was used in a case concerning a private contract, and although the liability sought to be enforced in this action is one created by statute, still we think the same

principle of construction applies. It was not the intention of the statute to repeal the law establishing the liability of a policy holder, but simply to regulate the time within which it should be enforced, and the statute should be so interpreted as thus to regulate, and not to destroy. It is not applicable to a case like this. For cases bearing upon these principles of construction, see *Call v. Hagger*, 8 Mass. 423; *Smith v. Morrison*, 22 Pick. 430; *King v. Tirrell*, 2 Gray, 331; *Bigelow v. Bemis*, 2 Allen, 496, 497, and cases therein cited.

The decision, to which we have come upon this question, renders it unnecessary to consider whether the defendant is not concluded by the judgment of the court, in which the proceedings were had, confirming the assessment.

Judgment for the plaintiff.

ATTORNEY GENERAL vs. MASSACHUSETTS PIPE LINE GAS COMPANY.

Suffolk. December 4, 1900.— May 22, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, BARKER,
HAMMOND, & LORING, JJ.

Tax, On corporate franchises.

A corporation having a capital stock divided into shares cannot relieve itself from liability to the franchise tax imposed by Pub. Sts. c. 13, §§ 38-40, by omitting to do business, nor by failing to file the certificate that its capital stock has been paid in, required by Pub. Sts. c. 106, § 46, before it can do business.

A gas company which has issued and received payment for the shares of capital stock authorized by its charter without obtaining the approval of the board of gas and electric light commissioners required by St. 1894, c. 450, is not a corporation "having a capital stock divided into shares" and therefore not liable to the franchise tax imposed by Pub. Sts. c. 13, §§ 38-40. Certificates thus issued are void and the money received for them has been paid without consideration and does not constitute assets of the corporation.

INFORMATION by the Attorney General at the relation of the Treasurer of the Commonwealth under Pub. Sts. c. 13, § 54, to collect from the defendant a franchise tax assessed upon it as of May 1, 1898, amounting to \$15,690 with interest thereon from December 10, 1898, filed January 25, 1900.

The case came on to be heard before *Hammond, J.*, who reserved it upon the pleadings and agreed facts for the consideration of the full court.

The agreed facts were as follows: The defendant, the Massachusetts Pipe Line Gas Company was incorporated by St. 1896, c. 537, "with all the powers and privileges and subject to all the duties, restrictions and liabilities in all general laws which now are or may hereafter be in force applicable to gas companies" and subject to the provisions of Pub. Sts. c. 13, §§ 38-40, relating to the taxation of corporations organized for business purposes "having a capital stock divided into shares." The incorporators organized on July 15, 1896, and voted to fix the capital stock of the corporation at \$1,000,000, divided into ten thousand shares of \$100 each, and to issue these shares. In December, 1897, the shares were subscribed for and paid for in full in cash, and certificates were issued therefor by the corporation to the subscribers.

In January, 1898, the defendant filed a petition under St. 1894, c. 450, with the board of gas and electric light commissioners, asking them to approve the issue of its capital stock. The board gave a hearing upon the petition in January, 1898, at which time counsel for the defendant raised the question whether St. 1894, c. 450, applied to the defendant. The board declined to pass upon that question while the petition was before it, and the defendant decided not to go on with that hearing, and withdrew its petition on the understanding with the board that such withdrawal should not prejudice its right to file another petition at any time for the same purpose.

On February 9, 1898, the board gave a hearing to the company on the question whether they should report the corporation to the Attorney General under the provisions of St. 1885, c. 314, § 12, for violating St. 1894, c. 450, by issuing its capital stock without first obtaining the approval of the board. After that hearing the board decided to report the matter to the Attorney General, and did so report it on February 17, 1898.

The Attorney General never brought any proceedings against the defendant for issuing its capital stock without the approval of the board, but, at the request of counsel for the defendant, he heard them upon the question whether the defendant had vio-

lated St. 1894, c. 450. The hearing was public, and counsel opposed to the defendant were heard. The Attorney General was of opinion that the defendant had violated the statute, and wrote a memorandum to that effect, which he caused to be printed in his report to the Legislature in January, 1899. Some time between March 1 and March 7, 1898, the defendant offered for filing the certificate required by Pub. Sts. c. 106, § 46, that the whole amount of its capital stock had been paid in; but the Secretary of the Commonwealth refused to receive and file the certificate on the ground that the company had not secured the approval of the board of gas and electric light commissioners to the issue of its capital stock.

On June 10, 1898, the corporation filed a second petition with the board of gas and electric light commissioners, asking the board to approve the issue of its capital stock, and on July 29, 1898, the board approved the issue. On August 1, 1898, a certificate was filed with the Secretary of the Commonwealth, setting forth the vote of the board approving the issue, as required by St. 1894, c. 450. On June 23, 1898, the corporation returned to the tax commissioner, under the oath of its treasurer, the information required by Pub. Sts. c. 18, § 38, stating, among other things, that on the first day of May, 1898, its place of business was at Boston, its capital stock was \$1,000,000, the whole number of shares was ten thousand, and the par value of each share was \$100; and also stated that "the issue of its capital stock had not nor has been approved by the board of gas and electric light commissioners."

The corporation began the transaction of business in October, 1898. It filed the certificate that the whole amount of its capital stock had been paid in, required by Pub. Sts. c. 106, § 46, on December 21, 1899. The tax commissioner assessed the tax upon the corporation after the approval of its issue of stock, in the manner and for the amount set forth in the information.

If on these facts the plaintiff was entitled to recover, judgment was to be entered on the information; otherwise, judgment was to be entered for the defendant.

The case was argued at the bar in December, 1900, and afterwards was submitted on briefs to all the justices.

A. W. De Goosh, Assistant Attorney General, for the plaintiff.
W. M. Butler & G. W. Cox, for the defendant.

KNOWLTON, J. The question in this case is whether the defendant was taxable under the Pub. Sts. c. 13, § 40, on May 1, 1898. This section imposes a tax on "every corporation embraced in the provisions of section thirty-eight." The provisions of § 38 apply to "every corporation chartered by the Commonwealth, or organized under the general laws, for purposes of business or profit, having a capital stock divided into shares." They require the treasurer "annually, between the first and the tenth day of May," to return to the tax commissioner a list of its shareholders, and a statement of various other facts which tend to show the value of its franchise. Section 39 requires the tax commissioner to ascertain from the returns or otherwise, the true market value of the shares of each corporation included in the provisions of § 38, as a basis for an assessment.

It is conceded that the defendant corporation came within the provisions of § 38 on May 1, 1898, if it then had "a capital stock divided into shares" within the meaning of the statute. Its treasurer did not seasonably make the return required by § 39, but it is not contended that his failure to do this duty until June 23, 1898, relieves it from liability to taxation.

The defendant was incorporated by the St. 1896, c. 537, and was made subject to the laws applicable to gas companies. In July, 1896, the corporation organized and voted to fix the capital stock at \$1,000,000, and to issue the same in shares of \$100 each. In December, 1897, these shares were subscribed for, and paid for in full in cash, and certificates were issued therefor by the corporation to the subscribers.

The defendant contends that it was not liable to taxation, because on May 1, 1898, it had not filed the certificate of the payment of its capital stock into its treasury, as required by the Pub. Sts. c. 106, § 46. This section declares that "No corporation which is subject to this chapter shall commence the transaction of the business for which it was organized or chartered until the whole amount of its capital stock has been paid in, and a certificate of that fact, . . . has been filed in the office of the secretary of the commonwealth." About March 1, 1898, the defendant offered such a certificate for filing, but because of

irregularity in issuing capital stock without the approval of the gas commissioners, the Secretary of the Commonwealth declined to receive it, and no such certificate was filed until December 21, 1899.

It has often been held that a tax assessed upon such corporations is upon the franchise, and not upon the property of the corporation. *Portland Bank v. Apthorp*, 12 Mass. 252. *Attorney General v. Bay State Mining Co.* 99 Mass. 148. *Commonwealth v. People's Five Cents Savings Bank*, 5 Allen, 428. *Commonwealth v. Provident Institution for Savings*, 12 Allen, 312. The defendant contends that this franchise is the power to do business, and that no tax can be assessed upon any corporation which has not done all that the law requires to be done before it commences business. The position of its counsel is stated in its brief as follows: "We go so far as to say that the only logical and the only fair conclusion is that a corporation may organize, issue capital stock, file its certificate with the secretary as required by Pub. Sts. c. 106, § 46; and so long as it never transacts any business, so long it may not be liable to pay a tax on a corporate franchise." We do not agree to this extreme contention. The franchise which subjects the corporation to taxation is the right to do business legally by complying with the laws. A corporation having this right under legislative action cannot relieve itself from liability to taxation by neglecting to do business, or ceasing to do business. Its franchise remains, and it may do business when it chooses. Nor can it escape taxation by failing to comply with a statute which is intended to regulate its conduct while doing business, or before commencing business. Whatever the effect of such conditions upon the amount to be assessed, after it once has a capital stock divided into shares nothing short of the loss of the franchise as a power that may be exercised, if the corporation chooses to comply with the law, can leave it free from liability to taxation under the statute. *Commonwealth v. Lancaster Savings Bank*, 123 Mass. 493.

It has been decided repeatedly that if a corporation goes on in the transaction of business, in disobedience of the Pub. Sts. c. 106, § 46, before the whole amount of its capital stock is paid in, its doings are not void on that account. *Chase's Patent Ele-*

vator Co. v. Boston Tow-Boat Co. 152 Mass. 428. *First National Bank of Salem v. Almy*, 117 Mass. 476. *Merrick v. Reynolds Engine & Governor Co.* 101 Mass. 381. Certain officers are personally liable for the debts in such cases (Pub. Sts. c. 106, § 60, St. 1898, c. 266) but the contracts made in disobedience of the statute are binding. What remedy might be obtained by the Attorney General, acting as a representative of the Commonwealth for the protection of the people, is a question which we need not consider. It follows that the failure of the defendant to file a certificate under the Pub. Sts. c. 106, § 46, did not relieve it from liability to taxation.

The next defence relied on is founded on the St. 1894, c. 450, § 1, which provides that "Gas companies and electric light companies . . . shall hereafter issue only such amounts of stock and bonds, as may from time to time, upon investigation by the board of gas and electric light commissioners be deemed and be voted by them to be reasonably requisite for the purposes for which such issue of stock or bonds has been authorized." By the St. 1896, c. 537, § 1, incorporating the defendant, it is made subject to the laws applicable to gas companies. Section 3 of this statute provides that its capital stock "shall be one million dollars, divided into ten thousand shares of the par value of one hundred dollars each," and also provides for a possible increase of it to an amount not exceeding \$5,000,000. Both parties now assume, and we think rightly, that the above quoted provision from the St. 1894, c. 450, § 1, applies to this company. The formal issue of its entire capital stock and of certificates for it, was, therefore, in violation of this statute. The defendant contends that its act in issuing it was, therefore, void. The real question is as to the effect of such an act done in violation of the statute; or, putting the question in another form, what is the meaning of the statute as applied to an attempted issue of stock by a corporation, contrary to its provisions. We are of opinion that the act is not directory, merely, but is, so to speak, jurisdictional. It prescribes the terms on which and the method by which such a corporation can issue capital stock divided into shares. As to the right of a corporation to fix the amount of its stock and to issue stock, it prescribes a prerequisite on which the right to act depends. We think that the elaborate requirements of § 1 of

this statute were intended to be fundamental, underlying the entire statutory authority of such corporations to issue stock. *Scovill v. Thayer*, 105 U. S. 143. The fact that the special charter of the defendant corporation fixes the capital stock at \$1,000,000, with authority to increase it, does not give the corporation authority to issue any stock without a vote of the commissioners under the section just referred to. The first sentence of this section brings within its provisions all gas and electric light companies "organized under general laws or under special charters, and however authorized to issue capital stock and bonds." The amount fixed by the charter was the amount that might be issued only under the authority of the commissioners; without their authority no amount could be issued.

Under this construction of the statute the action of the corporation in fixing the capital stock was wholly void, and the certificates which were issued were void, and it follows that the money paid in by the subscribers was paid without consideration, and that it was not assets of the corporation which could be used by it in its business, and that it did not represent an issue of capital stock.

On May 1, 1898, the defendant corporation had not a capital stock divided into shares within the meaning of the statute, and it was not taxable on its franchise according to the true market value of its shares, ascertained as required by the Pub. Sta. c. 13, § 89.

Decree for the defendant.

GEORGE FRED WILLIAMS vs. CARL F. MONK & another.

Suffolk. January 24, 1901. — May 22, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

Contract, Construction.

In an agreement to convey "a good title" to certain land "free and clear from all mortgage encumbrances, taxes and mechanics liens" the word "taxes" includes a sewer assessment.

CONTRACT on a promissory note made by Carl F. Monk and Agnes C. Monk for \$370 with interest thereon. Writ dated September 25, 1899.

At the trial in the Superior Court, before *Bond, J.*, the plaintiff introduced evidence tending to show that the defendants signed the note, and that it was given for money lent by the plaintiff to the defendants, and introduced the note in evidence.

It appeared in evidence that the plaintiff held the legal title to the property at the corner of Chapman Avenue and Carlos Street in Dorchester described in the following agreement between the plaintiff and the defendant Carl F. Monk dated February 3, 1899, and extended as shown below:

"Agreement made this third day of February, 1899, between George Fred Williams, of Dedham, County of Norfolk, and Commonwealth of Massachusetts, of the first part, and Carl F. Monk, of Boston, County of Suffolk, and Commonwealth aforesaid, of the second part.

"The party of the first part hereby agrees to sell, and the party of the second part to purchase, a certain estate situated on corner of Chapman Avenue and Carlos Street, Dorchester, Mass., consisting of a twelve-room frame dwelling house and stable, and thirteen thousand five hundred square feet of land more or less.

"Said premises are to be conveyed within fifteen days from this date by a quitclaim deed from the party of the first part, conveying a good title to same, free and clear from all mortgage encumbrances, taxes and mechanics liens.

"And for such deed and conveyance the party of the second part is to convey, or cause to be conveyed, to the party of the first part, four lots of land situated on Cottage Terrace, Roxbury, Mass., and numbered as follows: No. 35, 36, 37, 38, on plan drawn by W. O. Woods, and recorded with Suffolk Deeds, and containing about ten thousand feet of land and forty-three hundred dollars in cash. Said lots are to be conveyed within fifteen days from this date by the said Williams by quitclaim deed, and said Monk by a good and sufficient warranty deed conveying a good and clear title to same free and clear from all encumbrances. George Fred Williams." [SEAL.]

"The performance of above agreement is hereby extended until the 25th day of February, 1899, with the understanding that the above said Monk is to pay to said Williams five per cent on the amount of \$9,000 from time of this extension. Carl F. Monk, George Fred Williams."

"The performance of within agreement is hereby extended until March first, 1899. Carl F. Monk."

"The time for the performance of the within agreement is hereby extended until 2 o'clock, Wednesday, March 8, 1899. Carl F. Monk, George Fred Williams. March 4, 1899."

After putting in the foregoing evidence the plaintiff rested his case. Whereupon the defendants offered to prove that at the time of the passing of the papers in conformity with the agreement, on March 8, 1899, at the Registry of Deeds in Boston, it appeared there was a sewer assessment of \$370 upon the plaintiff's property; that at that time the plaintiff said that under his agreement the sewer assessment did not belong to him to pay; that the defendant Carl F. Monk said to the plaintiff that it did belong to him to pay; that Monk was prepared to pay to the plaintiff only the sum of \$4,300, called for by the agreement; that the sewer assessment amounted to about \$370, and was a valid assessment for the construction of a common sewer in the street upon which the property of the plaintiff was situated; that it was a lien upon the property to be conveyed by the plaintiff, and that it was existing at the time the agreement was entered into by the plaintiff and Carl F. Monk; that after some talk the plaintiff suggested that he would leave the sum of \$370 with one Fisher, to pay for the

sewer assessment, and suggested to the defendant Carl F. Monk that he give a note for the sum of \$370, signed by himself and wife, and that if it belonged to him, the plaintiff, to pay under the agreement, after investigation, he would return the note to the defendant; that if upon investigation it belonged to the defendant to pay under the agreement, then the note should be paid; that thereupon Carl F. Monk's wife, the other defendant in this action to whom the property was to be conveyed by the plaintiff, was called over from the place where she was then sitting, and was informed in the presence of the plaintiff of the facts. A note for \$370 was signed and delivered to the plaintiff, for which was substituted on the same day, under the same conditions and agreements, another note of the same purport, which is the note in suit.

Thereupon Agnes C. Monk received a conveyance of the property, the sum of \$3,930 was paid in cash to the plaintiff and the sum of \$370, retained out of the purchase money to pay the sewer assessment, was paid into the hands of Fisher by Monk, and Fisher paid the sewer assessment with it. The property to be conveyed to the plaintiff by the terms of the agreement was conveyed, all in pursuance of the talk and agreement at the Registry of Deeds.

At the close of this offer of proof, the judge ruled that the plaintiff, by the terms of the written agreement, had not covenanted to convey his property free and clear from the sewer assessment. The defendants asked the judge to rule that by the terms of the written agreement the plaintiff was bound to convey the property free and clear from the sewer assessment, which the judge refused to do. To the foregoing ruling and refusal to rule the defendants alleged exceptions.

The judge ordered a verdict for the plaintiff for the amount of the note and interest; and the defendants alleged exceptions.

C. F. Eldredge, for the defendants.

J. A. Halloran, for the plaintiff.

HOLMES, C. J. This is an action upon a promissory note for a part of the purchase money for land conveyed by the plaintiff to the first named defendant. At the time of the conveyance there was a dispute as to which party should pay an outstanding

sewer assessment which was a lien upon the premises. This defendant paid it with money retained out of the purchase money for that purpose, and made the note which was to be paid or returned according to the true construction of the agreement for the sale of the land. That is the only question before us.

Williams's land was to be conveyed by a "quitclaim deed . . . conveying a good title to same, free and clear from all mortgage encumbrances, taxes and mechanics liens," and the question may be narrowed to whether the word "taxes" as here used includes an assessment for a sewer. There is no doubt that the word may be used in such a way as either to include or to exclude it. In *Smith v. Abington Savings Bank*, 165 Mass. 285, an exception of "the taxes assessed for the year 1893" from a covenant against encumbrances, in a deed, was held to refer only to the ordinary annual taxes and not to embrace such a lien. But the nature of the instrument and other considerations may give the word a wider meaning. *Harvard College v. Aldermen of Boston*, 104 Mass. 470, 483. *Codman v. Johnson*, 104 Mass. 491, 492.

The same general considerations that were in favor of treating the lien as not excepted from the covenant against encumbrances in *Smith v. Abington Savings Bank* are in favor of treating it here as included among the encumbrances from which Williams's land was to be free. In general, when a man buys land he means to buy it free of encumbrances except so far as he expressly agrees to assume them. In this case the deed was to convey "a good title." And although it may be argued that these words, so far as they refer to possible encumbrances, are interpreted by the specific enumeration which follows, that argument does not quite destroy the indication to be drawn from them that the defendant meant to get an unencumbered title to the land. Again, in *Smith v. Abington Savings Bank* the very form of the expression pointed to annually recurring rather than to exceptional taxes, whereas here the connection would lead to reading "taxes" as meaning all taxes which give rise to liens.

The defendant also conveyed certain lots of land to the plaintiff, and the words of the contract with regard to them are "Said lots are to be conveyed within fifteen days from this date by the said Williams by quitclaim deed, and said Monk by a good and

sufficient warranty deed conveying a good and clear title to same free and clear from all encumbrances." The last six words might be read as referring to the deeds on both sides, and thus as strengthening the construction which we adopt. But as what Williams was to do had been described earlier in the instrument, we hardly should rely upon this later passage to enlarge the meaning of that which went before. In our opinion the sewer assessment was a tax within the meaning of the contract.

Exceptions sustained.

ALBERT A. BRUMMETT vs. CITY OF BOSTON.

Suffolk. March 5, 1901. — May 22, 1901.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

Way, Defect in Highway.

In an action under Pub. Sts. c. 52, § 18, against a city for injuries caused by the caving in of a sidewalk on which the plaintiff was walking, it appeared, that the earth beneath the sidewalk might have been undermined by an escape of water from a water pipe of the city, that, three or four days before, complaint had been made to the water department, that water came from the street into the cellar adjoining the sidewalk where the accident occurred, and that employees of the water department examined the cellar and saw the water coming in through the foundation wall of the building then took up the pavement in front of the sidewalk and did some work there, and the flow of water stopped. *Held*, that there was no evidence that the city had reasonable notice of the defect or might have had such notice by the exercise of proper care and diligence, as the appearance of the ground at the point where the water department stopped work might have given no indication that the earth beneath the sidewalk had been washed out.

TORT under Pub. Sts. c. 52, § 18, to recover for personal injuries caused by the caving in of a sidewalk on which the plaintiff was walking on Dudley Street in that part of Boston called Roxbury. Writ dated April 7, 1900.

At the trial in the Superior Court, before *Aiken, J.*, the plaintiff introduced evidence tending to show that on December 24, 1899, at 8 P. M., he was walking upon the sidewalk of Dudley Street in the Roxbury district of Boston; that when he reached a point in front of No. 126, close to the curb, the surface of the

sidewalk suddenly sank beneath his weight; that he went into the hole, which was about one and one half feet square, nearly up to his knees, and was thrown forward upon his face and injured.

The plaintiff also introduced evidence tending to show that the place where the accident happened was in the immediate vicinity of the new Dudley Street station of the Boston Elevated Railway Company; that Dudley Street was one of the principal streets in the Roxbury district and was the most travelled of any street in that district; that a short time before the accident a great deal of digging and excavating had been done between the lines of the sidewalk in front of No. 126; that a large hole ten or twelve feet deep had been dug in order to lay the foundation for a post near by supporting the structure of the elevated railroad and in connection with this work some blasting had been done in the sidewalk; that a trolley wire pole had formerly stood near this post and had been taken up a short time before the accident and shifted to its present position on the other side of the place of the accident; that an electric light pole had been placed in the sidewalk in the immediate vicinity of the spot where the plaintiff fell; that it had been taken up within a month before the accident and removed to the other side of the street, and the hole filled in and the earth stamped down; that a hydrant or water meter which had been placed in the sidewalk within a few feet of the spot where the plaintiff fell had also been taken up and removed, and the hole filled in a short time before the accident. It did not appear who removed the hydrant.

One Nelson, an employee of one McGrath, who occupied the store and basement of No. 126, testified that he saw the hole in the sidewalk where the plaintiff fell, on the morning after the plaintiff broke through; that three or four days before the day on which plaintiff was injured, the witness discovered water rushing into the cellar of No. 126; that it came through the front foundation wall of the building adjacent to the sidewalk and at a point opposite to the spot where the plaintiff broke through; that it covered the cellar floor to a depth of from one to two inches, and that he at once notified the agent of the owner of the building that the cellar was flooded with water which was com-

ing through the front wall of the building. One Macy, the janitor of the building, testified that immediately upon receipt of this notice he notified the water department of the city of Boston that water was coming into the cellar of No. 126. Macy and Nelson both testified that employees of the water department of the city of Boston came to the building on the day when these notices were sent, and entered the cellar and made an examination and saw the water coming in through the front wall; that these men wore badges of the water department of the city of Boston. They also testified that nothing was done by these men, or by any one else, inside of the building, in order to keep the water out, but that on the day following the day when the above notices were given, the employees of the water department took up the pavement and performed some work in the street, in front of the place where the plaintiff fell. The patch of pavement thus taken up and replaced, where the work was done, was about eight feet in length along the curb and a few feet wide extending out from the curb. Nelson testified that as soon as this work was done in the street the water stopped coming into the cellar, and that while he remained in the employ of McGrath, until June, 1900, no more water came into the cellar. And this was corroborated by Macy.

Nelson also testified that there had been an aperture between the curb and the street pavement, about two or three feet long, in front of the post supporting the elevated structure above referred to, and that this aperture was filled with cement a few days before the accident; that the sidewalk was in a very poor condition; and that he noticed, when sweeping the sidewalk, that pools of water gathered upon the surface.

The plaintiff testified that the soil under his feet in the hole was soft and muddy, and that his shoes and his trousers below the knees were covered with mud. He also testified that it had been raining quite hard off and on that day.

The foregoing is in substance all the evidence that appeared by the report.

The defendant offered no evidence, and at the close of the plaintiff's case requested the judge to direct a verdict for the defendant on the ground that it did not appear from the evidence that the defendant had reasonable notice of the defect, or might

have had notice thereof by the exercise of proper care and diligence on its part. This was the only question raised.

The judge ruled as requested and ordered the jury to return a verdict for the defendant, and reported the case for the consideration of this court. If the ruling was correct, judgment was to be entered for the defendant upon the verdict. If not, the verdict was to be set aside and a new trial ordered.

J. J. McCarthy, for the plaintiff.

P. Nichols, for the defendant.

HOLMES, C. J. This is an action for personal injuries caused by the sudden falling in of a sidewalk upon which the plaintiff was walking. The question is whether there was any evidence of notice to the city of its dangerous condition. At the trial the judge directed a verdict for the defendant, and reported the case.

There had been some digging and blasting near by for a post for the Elevated Railway. A trolley wire pole had been moved to near the place. An electric light pole close to the spot had been taken up a month before and the hole filled in, and the same thing had been done later with a hydrant. But whether the soil was disturbed at the precise spot did not appear. Who did the work was not proved except by inference, nor did it appear that the work was done improperly, or, if it was, that the city had notice of the fact. In *Bingham v. Boston*, 161 Mass. 3, there was such notice. It had been raining hard, and if the rain coupled with the recent disturbances of the soil caused the accident, the city cannot be held.

It would seem more probable that the immediate and active cause was the escape of water, presumably from a water pipe of the city, which was noticed and complained of three or four days before. The water came from the street into the cellar adjoining the sidewalk where the plaintiff fell and, very likely, undermined it. Upon receipt of the notice men from the water department took up the pavement in front of the sidewalk and did some work. The flow of the water then stopped. The strongest argument for the plaintiff is that the city, having notice through its water department of the course of the water, fairly might have been found negligent in not discovering the supposed effect of the water between the place it repaired and the building.

But apart from other questions, *Stoddard v. Winchester*, 157 Mass. 567, 574, this is pure conjecture. If it were permissible to guess, it is as likely that the earth looked safe at the point where the water department stopped work as that the person in charge went away leaving a manifestly unsafe place. There is an even chance that the water would not have done any harm but for negligent filling done by a third person and unknown to the city. Even assuming that the probabilities are that the escape of water from a pipe had undermined the sidewalk, the rest of the case is too uncertain to warrant a finding that the defendant was in fault.

Judgment for defendant.

ELLEN M. HOWE *vs.* EMERY C. WATSON, administrator,
& others.

Hampden. March 6, 1901. — May 22, 1901.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

Estoppel. Frauds, Statute of. Equity Jurisdiction, Specific performance.

In a suit by a woman to enforce against the estate of her deceased sister an agreement of the deceased to leave all her property to the plaintiff, it is no bar to the plaintiff's recovery that in ignorance of her rights she accepted payments of money from the administrator as a part of her distributive share of her sister's estate.

A letter began: "Dear sister Ellen" and contained the following: "Will you and Minnie come and stay with me as long as I live I will pay all your expenses, and what property I have left will be yours Ellen, my expenses are very large but all that I leave shall be yours." The letter was signed in the name of the person making the offer and the offer was accepted orally by the person addressed who was the only sister Ellen of the writer. In a suit to enforce the contract contained in the letter, it was *held*, that the letter satisfied the requirements of the statute of frauds and of St. 1888, c. 372, requiring an agreement to leave property by will to be in writing, that the description of the person addressed was sufficient, and also the description of the property, as the amount of all the property which the writer should leave at her decease could be made certain.

A woman eighty-five years old offered in writing to give to her sister, seventy years old, all the property she should leave at her decease, if the sister and her daughter would come and stay with her during the remainder of her life. The younger sister accepted the offer and with her daughter came from a distant State and stayed with the older sister until her death thirty-eight hours after their arrival. She died intestate, leaving real estate worth about \$4,000 and personal property worth about \$2,000. In a suit in equity brought by the surviving sister against

the administrator of the estate of the deceased sister and the heirs at law of the deceased, it was *held*, that the contract was fair and equal, and, although it could not have been specifically enforced against the plaintiff, was of such a nature that the time for performance by the defendant could not come until the plaintiff's part had been fully performed, that the plaintiff had fully performed her part of the contract, and that, considering the situation of the parties and their relation to each other and the moderate size of the estate, the plaintiff should not be relegated to her rights in an action at law, but was entitled to a decree ordering that the real estate be conveyed to her and that the administrator pay over to her all personal property remaining in his possession after satisfying all claims against the estate.

BILL IN EQUITY, by amendment from an action of contract, to enforce an agreement contained in a letter of Nancy J. Ball, the defendant Watson's intestate, to leave to the plaintiff all the intestate's property, the heirs at law of the intestate being joined as defendants. Writ in the original action at law dated September 12, 1895.

In the Superior Court the case was heard by *Braley, J.*, who reserved it upon the pleadings and the master's report for the consideration of this court.

The letter containing the agreement sought to be enforced was as follows:

"Springfield, April 16, 1894. Dear Sister Ellen: I don't think I am getting any better I am feeling very bad. Will you and Minnie come and stay with me as long as I live I will pay all your expenses, and what property I have left will be yours Ellen, my expenses are very large but all that I leave shall be yours. Should like to have you come just as soon as you can My nurse cannot stay very much longer and Mr. Jenkins is going to move. Try and get here before they move. Yours with love your far off sister. Nancy J. Ball, Per Mary E. Chapman.

"P. S. Dear Cousin I write this letter for Mrs. Ball she is not able to write, come just as soon as you can. The Doctor says Mrs. Ball cannot live long she is failing fast. M. E. C."

Henry W. Bosworth, Esquire, appointed special master in the case reported as follows:

"I find that Nancy J. Ball, late of Springfield, Massachusetts, died on May 21, 1894, seised and possessed of real and personal estate; that in July, 1894, the defendant, Emery C. Watson, was duly appointed administrator of her estate; that his inven-

tory filed therein shows personal estate valued at \$2,243.86, and real estate valued at \$4,000. . . .

"I find that on the sixteenth day of April, 1894, Ball, at her home in Springfield, authorized and directed the sending of the letter, a copy of which is annexed to the bill of complaint, to the plaintiff then at Orlando, Florida; that on receiving the same the plaintiff communicated to Ball her consent to coming with her daughter Minnie from Orlando to Springfield, if Ball would advance money to cover the expense; that Ball afterward, on May 4, 1894, sent the plaintiff a draft for \$100, which the plaintiff received, and that the plaintiff with her daughter came from Orlando to Springfield, arriving at the home of Ball on May 19, 1894, where they remained till after the death of Ball, which occurred about thirty-eight hours after their arrival.

"Evidence was introduced at the hearing tending to show that Ball was on April 16, 1894, and ever thereafter, and for several months before, so weakened in mind by age and disease, she then being in her eighty-sixth year, and having suffered much from illness, as to be incapable of making a binding contract. But I find on the whole evidence that Ball, though enfeebled somewhat in mind by age and illness, had at the time sufficient mental capacity for making a valid will or a valid contract.

"It appeared from the evidence that the letter in evidence with statements previously made by Ball to the plaintiff led the plaintiff to believe that Ball would leave a will giving her property to the plaintiff, that after diligent search by the plaintiff and others, when no will of Ball could be found, the administrator was appointed; that afterward the plaintiff, with some of the other heirs of Ball, executed a power of attorney to the administrator, giving him charge of the real estate and authorizing him to sell it; that in August, 1894, the administrator made four payments to the plaintiff in cash, in rents she had collected and in personal articles of the estate, amounting in all to \$227.13, and she gave a receipt to him for each payment as being part of her distributive share in the estate of Ball; that in the same month she was paid by the administrator seventy-five dollars as from the distributive share of Clara Fraser in the estate, and one hundred dollars as from the distributive

share of Laura A. Watson, these sums being paid on orders from those next of kin respectively, and being duly receipted for by the plaintiff as from such distributive shares respectively, and that all these things were transacted before the plaintiff had taken legal counsel as to her rights now in question."

The defendant filed two exceptions to the special master's report. 1. To the master's finding that the letter, of which a copy was annexed to the bill of complaint, was authorized or directed to be sent by Nancy J. Ball to the plaintiff, and averring that this finding was not warranted by the evidence. 2. To the master's finding that Nancy J. Ball, at the time the letter was written, had sufficient mental capacity for making a valid will or valid contract, and averring that this finding was not warranted by the evidence.

When the case was reserved the following decree was entered in the Superior Court: "This case came on to be heard this day, upon the coming in of the Special Master's Report, and was argued by counsel, and by consent the exceptions to said Master's Report, filed by the defendants, are overruled, and thereupon, upon consideration thereof, it is ordered, adjudged and decreed that the Master's Report be affirmed."

The evidence reported by the special master was set forth in the report to this court and the material portions of it are described in the opinion of the court.

E. P. Kendrick, for the administrator.

D. E. Webster & E. H. Lathrop, for the heirs at law of the testatrix.

W. W. McClench & C. W. Bosworth, for the plaintiff.

HAMMOND, J. This was originally an action at law to recover damages for the breach of a contract alleged to have been made between the plaintiff and the defendant's intestate, by the terms of which the latter agreed to leave at her death all her property to the plaintiff. It was subsequently changed into a suit in equity, and the heirs at law of the intestate were joined with the original defendant as parties defendant. The bill alleges in substance the contract as set out in the declaration in the action at law, and prays that the real estate left by the deceased may be decreed to belong to the plaintiff, and may be conveyed to her by some proper deed, and that

the administrator may be ordered to pay over to her the personal property, which may remain in his possession, after all claims against the estate are satisfied. Various answers were filed, and, the pleadings being completed, the case was sent to a special master to report to the court the facts, and such evidence as either party might request. Upon the filing of the report, the defendants excepted to the finding that the letter of April 16, 1894, from the deceased to the plaintiff, upon which the plaintiff relies as showing the alleged contract, was authorized by the deceased; and to the finding that, at the time the letter was written, the deceased had sufficient capacity for making a valid will or contract; the ground of the objection to each finding being that it was not warranted by the evidence.

Upon the hearing on these exceptions, they were overruled by consent, the report was affirmed, and a decree to that effect was duly entered. Thereupon, the presiding justice reserved the case for this court "upon the pleadings and master's report."

It seems to have been the understanding of the parties that, although the exceptions to the master's report were overruled by consent and the report was confirmed, still the reservation means that the evidence reported by the master is a part of the report, and that the objections made to the report by the exceptions are still open to the defendant; and counsel upon each side have presented to us the case upon that understanding, and have argued among other things the points raised by the exceptions. Without deciding that such is the effect of the reservation, we have under the circumstances examined the evidence to see whether the findings to which the exceptions relate should stand.

The evidence relating to the finding that the letter was authorized by the deceased, is clear and direct, and the only question can be as to her mental capacity. The evidence relating to the finding that, at the time the letter was written, the deceased had sufficient mental capacity to make a valid will or valid contract, is conflicting. The witness, Mary E. Chapman, who wrote the letter, testified that she was in the habit of visiting the deceased perhaps once or twice a week during the spring of 1894; that the latter was her father's cousin; that the wit-

ness had frequently talked with her about sending for the plaintiff, and that, at the time the letter was written, the intestate was dressed, and sitting up in a chair, was able to walk about the house, "was smart and seemed pretty well"; that she appeared in her right mind; that "her mind was just as clear as it could be; as it ever had been"; that she dictated to the witness "every word and every line" of the letter, and that the witness wrote under her dictation; that the witness read to her the letter after it was thus written, and that the deceased approved it, and directed her to sign her own name and the name of the witness, and to mail it. It is true that the physicians, who attended her during the time within which this letter was written, testified that the mental faculties of the deceased were impaired to a great extent, in which in some degree they were corroborated by the nurse who waited upon her. Still, we cannot say upon the evidence that the master who heard the witnesses was wrong in his finding as to the mental capacity of the deceased. These findings of the master must therefore stand.

The plaintiff says that the deceased offered to give all the property she should leave at her decease to the plaintiff, if she and her daughter would come and stay with the deceased during the remainder of her life; that the plaintiff accepted the offer, and, with her daughter, came and stayed with the deceased as long as she lived.

The first question is whether the contract is proved. The evidence of the offer upon which the plaintiff relies is not parol, but is found in the letter of April 16, 1894, which is as follows:

"Springfield, April 16, 1894. Dear Sister Ellen: I don't think I am getting any better I am feeling very bad. Will you and Minnie come and stay with me as long as I live I will pay all your expenses, and what property I have left will be yours Ellen, my expenses are very large but all that I leave shall be yours. Should like to have you come just as soon as you can My nurse cannot stay very much longer and Mr. Jenkins is going to move. Try and get here before they move. Yours with love your far off sister. Nancy J. Ball, Per Mary E. Chapman. P. S. Dear Cousin I write this letter for Mrs. Ball she is not able to write, come just as soon as you can. The Doctor says Mrs. Ball cannot live long she is failing fast. M. E. C."

It is well to consider the circumstances existing at the time the letter was written, and the relations the parties bore to each other. The plaintiff Ellen, and the intestate Nancy, were sisters, aged seventy and eighty-five years respectively. Both had been married, and both were widows. Ellen, when nine years of age, went to live with Nancy and her husband as their daughter, until she was married. At the time the letter was written, Nancy was living in her house in Springfield in this State. A part of it was let to a tenant, and a part occupied by her. She was cared for by a hired nurse. She was apprehensive that both the nurse and the tenant might leave. She was infirm with age and disease, and she had no issue living. The most of her near relatives were far away from her, and there does not appear to have been in her vicinity any one upon whom she could call. She was evidently convinced that she could reasonably expect but little more of life, and that even that must be attended with pain and infirmity. She was liable at any time to be without a tenant, or a nurse. Besides the house in which she lived, which was worth about \$4,000, she had personal property amounting to about \$2,000. She expected to leave something, but "her expenses were large," as she thought, and she could not tell how much would be left at her death. In this gloomy and lonely situation, this venerable and infirm woman is thinking of her sister Ellen, who, in years gone by, had been long a member of her household as a daughter; and in these last days she longs for her companionship. She knows that this sister and daughter are living in Florida in very modest circumstances, but she is determined to have them come to her if possible, and she writes the letter. The first sentence shows that she is discouraged about her own health, and states her reason for writing the letter. In the next sentence, she asks if Ellen and the daughter will come and stay with her "as long as I live." She is proposing an arrangement which shall last during her life, and the proposition is addressed to a favorite sister. It is a proposition requiring in substance that the sister, who is seventy years of age, shall break up her own home in a distant State. It is not difficult to see by the urgency of the appeal the eagerness with which the proposition is made, and the anxiety that it shall be accepted. To induce her sister to come she writes "my ex-

penses are very large but all that I leave shall be yours." This is not the language of a woman to the man she is about to marry, expressing with the extravagance somewhat characteristic of such communications the writer's intention that her property shall be shared and enjoyed in connection with him. See *White v. Bigelow*, 154 Mass. 593, and *Walker v. Walker*, 175 Mass. 849. Nor is it the expression of the writer's idea of what the law will do with her estate, nor is it contained in a communication of the general tenor of a friendly letter manifestly having no relation to business. It is found in a communication written for the sole purpose of inducing the sister to come and stay with her during her life. Nor does it come from a person having a reasonable expectation of many years of life, who therefore may be presumed to be slow to deprive himself of the right to dispose of his property. Nor is the promise inconsistent with any duty owed to other relatives. It contemplates an arrangement for the last remaining days of a life already prolonged beyond the allotted age. It relates only to what may be left after the expenses of that life are paid, it is made to a favorite sister, and there is nothing to show that, so far as respects not only the physical comfort, but also the peace of mind of the promisor, it was not the best and most comfortable arrangement she could have made. It is a promise to induce action. It is plain and direct in language, and in the form of an absolute promise, and all the circumstances tend to show that it was made as such.

It is objected that the evidence does not show that the plaintiff accepted the proposition made in the letter. The proposition was that the plaintiff should break up her home in Florida, where she was living with her son and daughter, — both of whom, so far as it appears, were unmarried, — and should come with her daughter to Springfield, and stay with her sister as long as the latter should live. The plaintiff, on the reception of the letter, replied at once that she would come just as soon as she could "perfect arrangements, pack my [her] household goods, etc.," as she did not know when, if ever, she would return to Florida. The money to pay her expenses was sent to her by her sister in accordance with the promise contained in the first letter, and, with reasonable dispatch under all the circumstances, the plaintiff, on the nineteenth day of May, came with her daughter

to her sister's house, where she remained until the death of her sister, which occurred about thirty-eight hours after their arrival.

Here we have in writing a request, that the plaintiff do certain acts involving considerable preparation for a woman of her age, and a change in her home life for an indefinite period, accompanied with a promise to give compensation, and a compliance with that request upon the part of the plaintiff. In view of all the circumstances, no satisfactory reason appears why she should perform these acts in compliance with the request except in reliance upon the promise which accompanied it. Moreover, in answer to the nineteenth cross-interrogatory propounded to her by the defendants, whether she wrote to her sister that she would make no claim upon her estate if she would send her \$100, she says: "No, I went because she was my sister, and because she wanted me to go, and because I could afford to go, and shut up my Florida home, if she would pay all my expenses and then leave her property to me. Had it not been that I fully expected to fall heir to her property, I could have ill afforded to break up in Florida and go, however anxious I might have been to be with her in her last moments."

It is true that to the twenty-second cross-interrogatory, as to whether she understood that her sister before she died had agreed to give her estate or any part of it to her, the plaintiff, as pay for her coming to Springfield to stay, she said "No," but that answer is inconsistent with the general tenor of her testimony and with the answers given before, and cannot be taken as controlling them. Upon the findings of the master and the evidence, we can have no doubt that the contract is proved as alleged in the bill. *First National Bank v. Watkins*, 154 Mass. 385, 387, 388. The plaintiff performed her part of the contract. It is true that her sister lived only thirty-eight hours after she arrived, but she had left her home in Florida, and had performed the contract to the letter. Whether she would have been able to do what the contract called for, if the sickness of the intestate had lasted for months, or years, is not now material. She undertook to perform it, and under the circumstances did all that the contract required. The fact that her sister died so soon, seems to us to be immaterial upon the rights of the plaintiff.

Nor is the fact, that the plaintiff has received from the administrator money as and for a part of her distributive share and of that of another heir, conclusive against her. It is plain that all along she expected to find a will, that she protested she was entitled to the property, and that she was ignorant of her rights. There is no estoppel by reason of a change of position on the part of the administrator, or of any one else through her acts. The money already received by her may be charged against her, for she can have it but once.

The contract is valid. "That it is competent for a party to stipulate for the disposition of his property at the time of his decease is too well settled to admit of doubt or question." Bigelow, C. J., in *Jenkins v. Stetson*, 9 Allen, 128, 132. See also *Wellington v. Apthorp*, 145 Mass. 69; *Schutt v. Missionary Society*, 14 Stew. 115.

The contract meets the requirement of the statute of frauds and of St. 1888, c. 372. The acceptance of a written offer need not be in writing. *Sanborn v. Flagler*, 9 Allen, 474. The plaintiff is sufficiently described as the party to the contract. The letter was sent to the plaintiff, who was the only "sister Ellen" the deceased had. *Potter v. Duffield*, L. R. 18 Eq. 4, 7. The property is sufficiently described. It is to be all the property which the deceased shall leave at her decease. *Id certum est quod certum reddi potest*. *Hurley v. Brown*, 98 Mass. 545. *Ryder v. Loomis*, 161 Mass. 161, and cases therein cited. *Nichols v. Johnson*, 10 Conn. 192. *Roehl v. Haumesser*, 114 Ind. 311.

The difficult question in this case is whether the plaintiff shall have a decree for specific performance, or whether she shall be relegated to her rights under an action at law. The contract upon its face is not open to the objection that it is not fair and equal. At the time it was made, it could not have been foreseen which party would profit the most by it. The promisor might have lived until her estate was exhausted in her support, or otherwise dissipated. Each party assumed the loss or gain by contingencies, and each was willing to do so. There is no evidence of fraud, mistake, or undue influence. The contract must be regarded as fair and equal in its nature, and as voluntarily made. It is true, that it is generally laid down that the contract must be of such a nature that the right to specific per-

formance must be mutual. But the exceptions to the rule are numerous, and the principle cannot be controlling and decisive against the plaintiff in a case like this, where, by the nature of the contract the time for specific performance does not come until the contract is fully performed by the one seeking it, and the contract has been fully performed by such party. While on this the authorities are conflicting, (see, for instance, *Allen v. Cerro Gordo Co.* 40 Iowa, 349, and *Cooper v. Pena*, 21 Cal. 403,) we cannot see why, on principle, an actual performance is not as good as an obligation to perform, so far as respects the right to a specific performance; and there are many cases where such relief has been granted in a case like this. See for discussion of this subject and a collection of the authorities, Pomeroy, Spec. Perf. §§ 167, 168, and cases cited in the notes thereto.

While the question whether, in this case, there should be a decree for specific performance is one of some difficulty, still in view of the situation of the parties, their relations to each other, and the moderate size of the estate, we think that the plaintiff can maintain her bill, and that she is entitled to the relief prayed for; and it is

So ordered.

MICHAEL F. D'ARCY vs. JENNIE D. STEUER.

Middlesex. March 8, 1901. — May 22, 1901.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

Pleading, Civil. Replevin, General denial.

In replevin under our practice there may be a judgment for a return under a general denial, which is broader than the old plea of *non cepit* and puts in issue the plaintiff's right of possession.

REPLEVIN for certain doors alleged to be the property of the plaintiff and detained by the defendant. Writ dated May 4, 1899.

The answer was a general denial.

In the Superior Court the case was heard without a jury by *Stevens, J.*, who found for the defendant and assessed damages

in the sum of \$1. Afterwards the defendant moved for an order for a return. The plaintiff objected on the ground that the answer being only a general denial did not set up title to the goods in the defendant or show any grounds for a return of the goods replevied, and requested the judge to rule that an order for a return should not issue. The judge refused so to rule, and granted the motion of the defendant that an order of return should issue. The plaintiff alleged exceptions.

G. J. Weller, for the plaintiff.

P. Tworoger, for the defendant.

HOLMES, C. J. An answer in the form of a general denial long has been sanctioned under our practice act. *Boston Relief & Submarine Co. v. Burnett*, 1 Allen, 410. It is permissible in replevin, as in other personal actions, and puts in issue the plaintiff's right of possession. *Spooner v. Cummings*, 151 Mass. 313. In other words it is broader than the old plea *non cepit*, and dispenses with the necessity of an avowry or cognizance in order to justify a judgment for a return. See *Bartlett v. Brickett*, 98 Mass. 521; Pub. Sts. c. 184, § 13. The practice in many other States under statutes would seem to be more or less like ours. *Fleet v. Lockwood*, 17 Conn. 233, 243. *Holliday v. McKinne*, 22 Fla. 153, 158. *Conner v. Comstock*, 17 Ind. 90, 92, 93. *King v. Ramsay*, 13 Ill. 619, 623. *Bates v. Buchanan*, 2 Bush, 117.

Exceptions overruled.

MARY WORCESTER vs. CITY OF BOSTON & another.

Suffolk. March 11, 1901. — May 22, 1901.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

Tax, Sale, Mortgagee's lien on surplus of proceeds.

St. 1888, c. 390, § 40, provides, that in case of a tax sale the collector may sell the whole or any part of the land and after satisfying the taxes and charges shall pay the balance "to the owner of the estate" upon demand. Held, that the word "owner" as used in this clause does not include a mortgagee not in possession, unless his interest as mortgagee has been taxed to him as real estate under Pub. Sts. c. 11, § 14. The mortgagee, however, has an equitable lien on the proceeds of the land, which he may enforce in equity against the grantee of the mortgagor or his assignee with notice.

A mortgage of land provided, that the mortgagor should pay all the taxes and assessments upon the premises and that in default thereof he should pay to the mortgagee all sums that the mortgagee should reasonably pay for such taxes, and that in case of a sale under the power contained in the mortgage the mortgagee should retain from the proceeds all sums secured by the deed. The mortgagor failed to pay a tax and the land was sold for taxes under St. 1888, c. 300. The mortgagee on learning of the sale redeemed the land from it under the provisions of the same statute. In a suit in equity by the mortgagee to recover the surplus of the proceeds from the tax sale, it was *held*, that, in enforcing his lien on such proceeds against the grantee of the mortgagor, the mortgagee was entitled to have the amount paid by him to redeem from the tax sale treated as part of the mortgage debt.

The provisions of St. 1888, c. 300, §§ 60-63, in regard to the payment by a mortgagee of a tax unpaid by the mortgagor, cannot operate to deprive a mortgagee of rights arising from the express terms of the mortgage.

BILL IN EQUITY by a mortgagee, who had redeemed a parcel of land in Boston from a sale for taxes, to recover from the city the proceeds received from the sale after deducting the amount of the tax due and expenses, and also against George H. Reed, holding under the mortgagor, filed April 27, 1900.

The case was heard on the bill and answers and evidence by *Lathrop, J.*, who found the following facts:

1. On or about June 30, 1897, one Adolph Rissell, being then seised in fee of the parcel of land before mentioned, borrowed from the plaintiff the sum of \$3,000, and gave the plaintiff his promissory note therefor, payable in three years after that date, and as security therefor mortgaged to the plaintiff the land in question. The mortgage was recorded on or about July 2, 1897.

2. On or about July 8, 1897, Rissell conveyed the premises in fee, subject to the mortgage, to one John Anderson, by deed duly recorded, and on or about January 6, 1898, Anderson, by deed duly recorded, conveyed the premises in fee, subject to the mortgage, to the George Woodman Company, a corporation organized under the laws of this Commonwealth.

3. On May 1, 1898, the George Woodman Company was seised in fee of the premises subject to the mortgage, and a tax was duly assessed to that corporation, as the owner thereof, for the year 1898, of \$54.40, which tax thereupon became a lien on the premises.

4. On or about September 12, 1898, the George Woodman Company conveyed the premises, subject to the mortgage, to one Cyrus C. Mayberry, by deed duly recorded, and Mayberry

remained seised in fee thereof subject to the mortgage until the tax sale and the conveyance hereinafter mentioned.

5. On or about December 28, 1899, the tax assessed to the George Woodman Company as owner of the premises then remaining unpaid, one Nathaniel H. Taylor, being then the collector of taxes for the city of Boston, and having taken all steps required by law to authorize and enable him legally to sell the premises for non-payment of the tax, sold the same at public auction, pursuant to law, to one William W. Reed, the brother of the defendant George H. Reed, for the sum of \$850, being \$785.80 in excess of the amount of the tax and the interest thereon, and incidental costs and expenses; and pursuant to the sale Taylor, as such collector, by deed dated January 11, 1900, and duly recorded, conveyed the premises to William W. Reed, the purchaser.

6. The semi-annual instalments of interest on the mortgage to the plaintiff were promptly paid to her by the successive owners from time to time of the premises until the instalment due December 30, 1899, which was not, and never has been, paid or tendered to the plaintiff, or to any person entitled to receive it. The plaintiff had no notice that the tax assessed for the year 1898 on the George Woodman Company as owner of the premises was unpaid, or that the premises were about to be sold for the non-payment thereof, or of the sale on December 28, 1899, until on or about January 22, 1900, when she received a letter from William W. Reed, informing her that the property had been sold to him for \$850, and that he held a tax title thereon.

7. On or about February 24, 1900, the plaintiff redeemed the premises from the tax sale by the payment of \$869.45 to William W. Reed, and received a release thereof from him; and on or about March 21, 1900, the instalment of interest due December 30, 1899, then remaining unpaid, and the plaintiff not having received payment of the amount of the tax from any person owning, or claiming to own, the equity of redemption in the premises, after due notice by publication as required by law and by the terms of the mortgage, sold the premises, pursuant to the power of sale contained in the mortgage deed, to one James Richard Carter, who bought the premises in her behalf for the

sum of \$3,100, a sum less than the amount of the principal and the interest due thereon, and by deed dated March 21, 1900, conveyed the premises, by agreement with Carter, to him for the use of the plaintiff, and the plaintiff is now seised in fee thereof; and the balance of the principal and interest due thereon remaining after applying the purchase money, and the costs of said foreclosure, and the amount paid by the plaintiff for the redemption of the premises as aforesaid, remain wholly unpaid.

8. On or about January 19, 1900, Cyrus C. Mayberry, by deed duly recorded, conveyed the premises to the defendant George H. Reed for \$151.62, and by deed purported also to assign to the defendant Reed all right to receive from the defendant the city of Boston the surplus proceeds of the tax sale of the premises on December 28, 1899. The conveyance was made subject to encumbrances of record, and Mayberry and the defendant Reed knew that the premises were subject to the mortgage to the plaintiff, and that the plaintiff was ignorant that the premises had been sold for taxes.

9. No evidence of conspiracy, as charged in the bill, was introduced.

10. The defendant George H. Reed claimed the surplus of the tax sale in the hands of the city, under the St. 1888, c. 390, § 40. The plaintiff claimed the surplus under this and other sections of the same statute.

11. The city, in its answer, admitted that it had in its possession the surplus of the tax sale, amounting to \$785.80, and was ready to pay it to the person or persons entitled thereto, and asked that, as it was a mere stakeholder, it might be allowed its costs.

The mortgage deed, a copy of which was annexed to the bill, provided that until the mortgage debt was paid the mortgagor, his heirs, executors, administrators or assigns, "shall pay all taxes and assessments, to whomsoever levied or assessed, whether on the granted premises or on any interest therein, or on the debt secured hereby, and whether in the nature of taxes and assessments now in being or not, . . . or in default thereof shall pay to the grantee, her heirs, executors, administrators or assigns, all such sums as she or they shall reasonably pay for

such taxes, assessments and insurance, with interest; . . . Said grantor hereby covenants and agrees for the consideration aforesaid to punctually pay said taxes and assessments, and not to make claim to any reimbursement whatever therefor, and the non-payment of such taxes and assessments when due shall be deemed a breach of this mortgage."

The power of sale clause contained the provision, that in case of a sale under the power the mortgagee shall "out of the proceeds of such sale retain all sums then secured by this deed (whether then or thereafter payable), with interest and all costs and expenses."

At the request of the parties, the justice reported the case for the consideration of the full court, such order or decree to be entered as to the court should seem meet.

W. H. Dunbar, for the plaintiff.

A. E. Clary, for the defendant George H. Reed, submitted the case on a brief.

HAMMOND, J. The first question is, whether the plaintiff is the owner to whom, under St. 1888, c. 390, § 40, the city is directed to pay the balance of the proceeds of the sale, remaining after satisfying the taxes and charges.

The material part of this section reads thus: "If the taxes are not paid the collector . . . may . . . sell the whole . . . of the land; and after satisfying the taxes and charges, he shall deposit the balance, if any, in the treasury of the city or town; and such city or town shall pay such balance to the owner of the estate upon demand."

Prior to the Revised Statutes, the collector could sell so much only of the land as should be sufficient to discharge the taxes and charges. St. 1785, c. 70, §§ 6, 7. Rev. Sts. c. 8, § 28.

But, upon the recommendation of the commissioners of the Revised Statutes, (see their note to c. 8,) the collector was authorized to sell the whole land, if in his opinion it could not be reasonably divided and a part set off without injury to the residue, and, after first satisfying the taxes and charges, he was to "pay over the residue of the proceeds of the sale to the owner of the estate, upon demand." Rev. Sts. c. 8, § 29.

Although this section has since been amended in various ways, this direction to pay the surplus to the "owner of the

estate" on demand has been a constant feature. Gen. Sts. c. 12, § 33. Pub. Sts. c. 12, § 35. St. 1888, c. 390, § 40.

In order to find the true interpretation to be given to the word "owner" in this connection, it is well to look somewhat into the statutes respecting the assessment and collection of taxes which were in existence when the provision as to the payment of the surplus proceeds of the sale first appeared. Taxes on real estate were assessed to the owner or occupant, and, in the case of mortgaged real estate, the mortgagor was to be deemed the owner unless the mortgagee took possession, after which he was deemed the owner. Rev. Sts. c. 7, § 7.

The assessors were required (§ 29) to make a list for public inspection, showing the valuation and assessment, which list should contain among other things the names of the persons assessed, and the description and value of the real and personal estate assessed to each; and also (§ 31) to commit a similar list with their warrant to the collector.

The collector, with this list and warrant before him, proceeded to collect the taxes named in the list "according to the warrant." Rev. Sts. c. 8, § 1. He could distrain the goods of, or arrest, the persons named in the warrant. §§ 7, 11. Taxes assessed on real estate constituted a lien thereon, and he could collect by sale thereof "after a demand of payment made either upon the person taxed, or upon any person occupying the estate." § 18. This remedy was in addition to the remedy by distress and arrest as against the person taxed.

Before selling, he was required to give notice of the time and place of sale by an advertisement which should also state "the names of all the owners, if known to the collector, with the amount of the taxes assessed on their lands respectively." §§ 24, 25.

Section 32 provides that the "owner . . . or his heirs or assigns," may redeem from the sale at any time within two years thereof.

Upon a consideration of these various provisions it is seen, that the persons against whom the collector was to proceed were those named in the list committed to him by the assessors. They were the persons upon whom he was to make his demand, whose goods he might distrain, and whom he might arrest.

His personal remedies for the collection of the tax could be enforced only against the persons named in the list. But in the proceedings to enforce the lien upon the land, he was not so strictly confined to such persons. The demand for the payment of the tax need not be made upon the person taxed, but it was sufficient if it was made upon any person occupying the land. The collector was required also to state in his notice of sale the names of all the owners known to him. This was an important part of his duty, since it might be that the person named in the tax list was not the owner at the time of the assessment, nor even taxed as such, but simply as the occupant.

The proceedings are to enforce a lien. It is manifest that, as a general rule, the only persons interested in them are the persons having an interest in the land at the time of sale, and that, following the usual rule in such cases, they would be the persons entitled to the surplus. To hold otherwise, and to say that the surplus should be paid to the owner at the time of the assessment, although he had parted with his title, so that at the time of the sale he was not the owner of the land, would be likely to work great injustice in many cases, and would be inconsistent with the general principles applicable to the enforcement of liens and the distribution of surplus proceeds in case of sale.

In the various changes which have since been made in the tax laws, there does not appear anything which changes the meaning of the word "owner" as used in this connection, and it must therefore be held that the word designates the owner at the time of the sale.

It is contended, however, by the plaintiff that the term "owner" should be held broad enough to include mortgagees; and that, in every case where there are such parties, it is the duty of the city or town to pay the money over to the persons interested, in the order of the priority of their interests in the land; in a word, that the money stands for the land, and that those who have any interest legal or equitable in the land have a like interest in the money.

But it is to be noted that, at the time this provision for the payment of the surplus was first inserted, it was to be paid by the collector himself, and the word "owner" had been pretty

clearly defined in the tax statutes, especially as between mortgagor and mortgagee. . In Rev. Sta. c. 7, § 7, it was provided that taxes on real estate were to be assessed to the owner or occupant, and in the case of mortgaged real estate "the mortgagor shall, for the purposes of taxation, be deemed the owner until the mortgagee shall take possession, after which the mortgagee shall be deemed the owner." It would be difficult to lay down the rule in clearer terms, so far as respects the assessment.

The tax, whether assessed to the owner of the fee or to the mortgagee in possession as the owner, was a tax upon the whole land; and the general rule was that the tax, whether assessed to the owner whose name might be known or unknown, or to a life tenant or an occupant, was a tax upon the whole land and not merely on the interest of the person taxed. The tax is upon the parcel of real estate as one entire interest. *Parker v. Baxter*, 2 Gray, 185, 189.

Titles to real estate are frequently very complicated. There may be life estates absolute or defeasible, vested or contingent, leasehold interests, mortgagees and lienors of various kinds, and the claims secured by the mortgages or liens may be secured by other estate either real or personal, so that it would be necessary in order to see how much of the claim should be a charge upon the surplus proceeds of the real estate sold to marshal the assets and to apply the complicated rules of law upon that subject. And it is to be remembered that, in many cases the collector is not learned in the law, that in all cases his duties are those of an executive officer, and that he has no way of determining the amount, if in dispute, of the sum due even in the case of a simple mortgage.

To hold under these conditions that the word "owner," as used in the first statute on this subject, was broad enough to include all the persons having an interest in the land as mortgagees or lienors at the time of the sale, and that it was the duty of the collector to distribute the surplus proceeds among such persons according to the value and priority of those interests, is to hold that there was imposed upon him the duty to investigate and decide complicated questions of title without giving him the power by which alone he could properly perform that duty. Nor is such a view of the statute consistent with

the simplicity desirable in the rules for the collection of taxes, and it would be impracticable in many cases. See *Farnsworth v. Boston*, 126 Mass. 1, 6. It is clear that the word "owner," as used in that first statute, meant simply the legal owner, or a mortgagee in possession.

Since the Revised Statutes there have been numerous changes in, and additions to, the tax laws, but none of them calls for any particular notice here, except possibly Pub. Sts. c. 11, §§ 14, 15 and 16. These sections provide in substance that, when a person has an interest in real estate as the holder of a duly recorded mortgage given to secure the payment of money the amount of which is fixed and certain, the amount of his interest shall be assessed to him as real estate, and the mortgagor shall be assessed only for the value of the real estate after deducting the assessed value of all the interests of such mortgagees. The amount of the interests of such mortgagees is to be determined by the assessors under certain rules. For the purposes of taxation, such mortgagors and mortgagees shall be deemed joint owners until possession is taken by the mortgagee. These provisions first appear in St. 1881, c. 304; and the act was passed, as is well known, for the purpose of abolishing what it was contended by some was a certain kind of double taxation. In 1882, however, it was provided that such mortgagor or mortgagee might bring in to the assessors a sworn statement respecting his interest in the real estate, and that if none was brought in the tax should not be "invalidated for the reason that a mortgagee's interest therein has not been assessed to him." St. 1882, c. 175. Since this last statute, the provisions of Pub. Sts. c. 11, §§ 14, 15, 16, are rarely regarded, and the result intended by them has been practically reached by a failure on the part of the assessors to assess to the mortgagee either as real or personal property the sum represented by the mortgage.

We are of opinion that, where the interest of such a mortgagee is assessed to him as real estate, he, by virtue of Pub. Sts. c. 11, § 16, must be regarded as one of the joint owners of the land, to whom the city or town is directed to pay the surplus, but that—at least since St. 1882, c. 175—where such a mortgagee does not bring in the statement required and his interest is not assessed to him as real estate, he is not such owner. The

owner is either the legal owner at the time of the sale, or a mortgagee whose interest in the real estate is of the kind described in Pub. Sta. c. 11, § 14, and has been assessed to him as real estate. It follows that the plaintiff was not an owner to whom the city is directed to pay the surplus.

But, while, as between the city and the owner at the time of the sale, the surplus belonged to the owner, it does not necessarily follow that, as between the owner and the mortgagee, the former's title to the proceeds will prevail. The mortgagee has an interest in the land which is superior to that of the mortgagor.

The general rule is that, when land is turned into money, especially by some act of the public authorities, the lien of the mortgagee extends to the money, and it may be enforced by equitable process. This principle has been fully recognized by this court. *Furnsworth v. Boston*, 126 Mass. 1. *Union Institution for Savings v. Boston*, 129 Mass. 82. *Wood v. Westborough*, 140 Mass. 403. Indeed, it is only one application of a general principle by which in equity one who has a lien upon property may follow the proceeds and enforce his lien thereon if there is no remedy at law. See *Wiggin v. Heywood*, 118 Mass. 514.

We are of the opinion that the principle is applicable to this case. The tax title was superior to the title of the plaintiff. The land was sold and changed to money. The plaintiff's title to the land was superior to Mayberry's title at the time of the sale, and hence her title to the proceeds is superior to his. Her lien upon the land became an equitable lien on the proceeds, and, there being no remedy in law, she is entitled to enforce it by equitable process.

Nor does the defendant Reed stand in any better condition than Mayberry. He purchased the latter's interest in the proceeds with full knowledge of the rights of the plaintiff. The price paid by him indicates also that he had full notice of the infirmity of his title.

There is no doubt that the amount paid to redeem the property from a tax sale should be added to and made a part of the debt secured by the mortgage, so far as respects the lien upon the land. The mortgage deed was upon the condition that the mortgagor, his heirs, executors or assigns, should pay all the

taxes and assessments upon the premises, and that, in default thereof, he should pay to the mortgagee all such sums as she should reasonably pay for such taxes. And further, that in case of sale under the power, the mortgagee should retain from the proceeds all sums secured by the deed.

Under these provisions of the mortgage deed, the mortgagee is clearly entitled to have the amount, paid to redeem from a tax sale, made a part of the mortgage debt. The sum so paid is the direct result of the breach of the condition of the mortgage.

- It was a sum which the mortgagee was obliged to pay in order to preserve her security unimpaired. *Skilton v. Roberts*, 129 Mass. 306, 309. *Windett v. Union Ins. Co.* 144 U. S. 581. *Jones, Mortgages*, §§ 77, 358, and cases there cited.

The defendant Reed contends that the right of the mortgagee to add to the principal of the mortgage debt sums paid for taxes is founded upon and regulated by statute, and that as the mortgagee has not pursued the course pointed out by St. 1888, c. 390, especially in §§ 60-63, he cannot now insist upon the right. We regard those provisions of the statute simply as pointing out a plain way which the mortgagee can pursue if he desires. Certainly they cannot be held to exclude a right arising, as in this case, out of the express terms of the mortgage deed.

Since the surplus is less than the sum secured by the mortgage and remaining unpaid, the plaintiff is entitled to a decree for the whole.

So ordered.

WILFRED H. GODDARD vs. BOSTON AND MAINE RAILROAD.

Suffolk. March 12, 1901. — May 22, 1901.

Present: HOLMES, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Carrier, Of passengers. Negligence.

A passenger, who leaving a train walks along a station platform on which other passengers are walking ahead of him and falls by stepping on a banana skin and is injured, cannot recover from the railroad company, if it does not appear how long the banana skin had been there or how it got there.

TORT by a passenger to recover for injuries from a fall caused by stepping on a banana skin on an artificial stone platform at the North Union Station in Boston. Writ dated April 27, 1900.

At the trial in the Superior Court, before *Aiken, J.*, there was no evidence showing how long the banana skin had lain where the plaintiff stepped on it or how it got there. The plaintiff testified that there were employees of the defendant near the spot when he fell, that he had just got off a smoking car at the rear of a train in which he had come from Lynn, that other passengers from the same train were walking along the platform and that there were people ahead of him, that he stepped on something which he found out afterwards was a banana skin. He saw it after he fell and another man kicked it off the platform against the wheel of a car, saying "That is what he fell on." A witness testified that the platform was of some artificial stone and very smooth.

The judge directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions.

J. E. Crowley, for the plaintiff.

W. I. Badger, for the defendant.

HOLMES, C. J. The banana skin upon which the plaintiff stepped and which caused him to slip may have been dropped within a minute by one of the persons who was leaving the train. It is unnecessary to go further to decide the case.

Exceptions overruled.

CHESTER H. GRAVES & others vs. WALTER B. JOHNSON.

Suffolk. March 13, 1901. — May 22, 1901.

Present: HOLMES, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Sale, Validity.

A dealer who sells intoxicating liquors in Massachusetts for transportation to the proprietor of a bar room in another State where the resale of the liquors by the purchaser would be illegal, and who correctly supposes that the purchaser intends to sell the liquors in his bar room in the other State but is wholly indifferent as to whether he does so or not, the purchaser knowing that the seller has no motive in making the sale except to sell his goods in Massachusetts in the usual course of business, may recover the price of the liquors in an action of contract. His divining correctly the defendant's intention does not connect the sale with the illegal consequences sufficiently to make it invalid.

CONTRACT to recover the price of certain intoxicating liquors sold by the plaintiffs to the defendant from September, 1888, to March, 1889. Writ dated December 21, 1889.

The second trial of this case in the Superior Court was before *Hammond, J.*, without a jury, and the exceptions were allowed by *Fessenden, J.*, after *Hammond, J.*, became a justice of this court. The exceptions taken at the first trial were sustained in a decision reported in 156 Mass. 211. At the second trial the following among other facts appeared :

The plaintiffs, at the time of the sales, held a United States liquor license and a wholesale liquor license under the law of Massachusetts, and were wholesale dealers in liquors, teas and coffees. The defendant at the time of the sales was proprietor of a hotel in Bangor, Maine, called the "Penobscot Exchange," and kept an open bar for the sale of liquors in that hotel. The entrances to the hotel were from two streets and the bar was in the corner between the two. The entrance to the bar room was within the hotel and directly opposite the entrance to the billiard room and about six feet from it. The orders for the liquors were taken by the plaintiffs' agent, one Ingalls, at the defendant's hotel in Bangor where the agent was stopping as a guest. The agent testified that the orders were given to him in the office. The defendant testified that he had a wine clerk

who took charge of his bar room, and to whom he was obliged to go and did go to find out what liquors were needed before giving orders for liquors, and that he went with the agent into the bar room and gave the orders to the agent there. The agent had stopped at the hotel as a guest on two or three of his trips to Bangor before obtaining the first order for the liquors. The agent had been selling liquors for the plaintiffs in the State of Maine six or eight years before making this sale, and testified that during the year of these sales he sold \$20,000 worth of liquors in the State of Maine. The defendant testified that at the time of giving the first order it was agreed between him and the agent that if the liquors were seized by the State authorities during transportation he would not be responsible for them, and that the plaintiffs should stand any losses until the liquors were delivered to him in Bangor.

From the testimony of Ingalls, the agent, the following appeared: The defendant paid the freight on the liquors. The first order obtained was for a barrel of Boston Old Rum. The plaintiffs' agent had no order book and simply a memorandum was made, which was afterwards written on a printed blank and sent by the agent to the plaintiffs, and which the defendant did not see. With the order was sent the following communication: "To C. H. Graves & Son, Boston: I send the above order subject to your approval; if you ship, follow closely instructions on face and back of this order. It is understood and agreed that delivery is at Boston, and buyer pays his own freight. Respectfully, E. A. Ingalls."

The defendant objected to the admission of this communication. The judge said: "It is simply the representations that were made to them. That is the only effect of it. What he says in that paper is no evidence of the truthfulness of what he said, but only evidence of the fact; what was said to the plaintiffs." The defendant objected to its admission as any part of the contract between the plaintiffs and the defendant. The judge said: "In so far as it states the contract, it is no evidence of the truthfulness; it is only evidence of representations made by this statement."

The second order was as follows: "December 20, 1888, W. B. Johnson, Bangor, Maine, December 20, half barrel of G. O. Tay-

lor Rye, \$1.20." The order was followed by the same declaration, addressed to the plaintiffs and signed by Ingalls, as that quoted above.

The defendant objected to its admission as having any bearing on the contract between the plaintiffs and the defendant.

The judge said: "I let it go in as a piece of paper sent by this witness — the agent."

The defendant put in evidence the Rev. Sts. of Maine, 1883, c. 27, and the St. of Maine, 1885, c. 366; and it was agreed that the law of Maine, so far as it pertained to this case, was covered by those statutes.

Upon the evidence about the sale, delivery and receipt of the goods by the defendant, about which there was no dispute, the judge found for the plaintiffs for the full amount claimed.

The defendant requested the judge to find that the plaintiffs knew that the sale of intoxicating liquors in the State of Maine was unlawful; that they knew that the defendant was in the habit of selling such liquors at his hotel in Bangor in that State unlawfully; that they solicited orders from him for such liquors in Bangor, and sold and delivered them to him in Bangor in violation of the laws of that State; that the defendant's intention at the time of ordering or purchasing the liquors was to sell them in violation of the laws of that State; that the plaintiffs knew of his intention at the time of the sale; that by their acts they aided and assisted him in the illegal sale of that liquor; that they held out inducements for him to purchase of them by their patronage and long credit, and thus facilitated and encouraged him in his unlawful selling; that they expected, intended and desired that he should so sell, so that he would continue his purchases and augment their profits; that the sale of the liquors by them to the defendant was made with a view to their being resold by him contrary to the laws of Maine.

The defendant requested the judge to rule:

First, That if the defendant, at the time of making the contract of purchase, intended to sell the liquors contrary to the laws of the State of Maine, and the plaintiffs knew of that intention and made the sale to him, the plaintiffs could not recover. This ruling was refused.

Second, That such sale with such knowledge of intention is,

in itself, evidence that the vendors intended to aid the buyer in the violation of said laws [and this action could not be maintained]. This ruling was given, except the part in brackets.

Third, That if the plaintiffs at the time of the purchase of the liquors of them by the defendant knew that he was in the habit of selling such liquors unlawfully, and knew that he intended to sell the liquors so purchased of them unlawfully, then the sale was made with a view to the liquors being resold contrary to law, and the plaintiffs could not recover. This ruling was refused.

Fourth, That if the orders for the liquors were obtained by the plaintiffs' agent at the defendant's hotel in Bangor, and they were to be delivered to him in Bangor, then the sale was made in Bangor, although the defendant paid the freight, and that the sale was void by the laws of the State of Maine. This ruling was refused.

Fifth, That the plaintiffs in this case are, in the sale of the liquors, bound by the knowledge and intention of their agent Ingalls. This ruling was given.

Sixth, That the plaintiffs' agent, while travelling and soliciting orders and doing business in the State of Maine, is conclusively presumed to know the laws of that State pertaining to the same. This ruling was given.

Seventh, That upon the evidence the sales by the plaintiffs to the defendant were void, whether they were made in Maine or Massachusetts. This ruling was refused.

Eighth, That upon all the evidence in this case the plaintiffs cannot maintain this action. This ruling was refused.

The judge made the following outline of basis of finding: "In this outline I allude only to the main points in controversy. I find that at the time the goods were ordered and delivered, the defendant intended to sell them, or the larger part of them, in his bar room, in violation of the law of Maine and not in the original package; that at the time of taking the orders Ingalls supposed, and had reason to suppose, that the defendant so intended; that the plaintiffs personally, at the time of the approval of the order and the delivery of the goods, had no knowledge, thought or care about the said intention of the defendant, or as to what was to be done with the goods by him, and that

neither Ingalls nor the plaintiffs at any time had (nor were supposed by the defendant to have) any desire, intent, interest, expectation, concern or care as to what disposition the defendant would make of the goods, but were absolutely indifferent as to what he would do or intended to do with them, and that their sole motive was (and was supposed by the defendant to be) to sell the goods in Massachusetts in the usual course of business for pecuniary profit, without any inference whatever as to what the defendant should do or intended to do with them, and without any interest, intent or desire to enable the defendant to sell illegally. I find the sale was made and completed in Massachusetts. I do not find that the plaintiffs erased any marks or in any way sought to conceal or did conceal the character of the goods." The judge found for the plaintiffs in the sum of \$330.

The defendant alleged exceptions to the refusals of the judge to rule as requested, and also to the admission of the two communications of Ingalls to the plaintiffs transmitting the defendant's orders for their approval. The last exception was not pressed or argued.

C. J. Martell, for the defendant.

A. Hemenway & J. Noble, Jr., for the plaintiffs, submitted the case on a brief.

HOLMES, C. J. This is the second time that this case comes before this court. 156 Mass. 211. It is a suit for the price of intoxicating liquors sold here. At the first trial it was found that they were sold with a view to their being resold by the defendant in Maine against the laws of that State; and on that state of facts it was held that the action would not lie. At the second trial it was found that the plaintiffs' agent supposed, rightly, that the defendant intended to resell the liquors in Maine unlawfully, but that the plaintiffs and their agent were and were known by the defendant to be indifferent to what he did with the goods, and to have no other motive or purpose than to sell them in Massachusetts in the usual course of business. Seemingly the plaintiffs did not act in aid of the defendant's intent beyond selling him the goods. The judge refused to rule that the plaintiffs' knowledge of the defendant's intent would prevent their recovery, and the case is here again on exceptions.

The principles involved are stated and some of the cases are collected in the former decision. All that it is necessary for us to say now is that in our opinion a sale otherwise lawful is not connected with subsequent unlawful conduct by the mere fact that the seller correctly divines the buyer's unlawful intent, closely enough to make the sale unlawful. It will be observed that the finding puts the plaintiffs' knowledge of the defendant's intent no higher than an uncommunicated inference as to what the defendant was likely to do. Of course the defendant was free to change his mind, and there was no communicated desire of the plaintiffs to coöperate with the defendant's present intent, such as was supposed in the former decision, but on the contrary an understood indifference to everything beyond an ordinary sale in Massachusetts. It may be that, as in the case of attempts, (*Commonwealth v. Peaslee*, 177 Mass. 267, *Commonwealth v. Kennedy*, 170 Mass. 18, 22,) the line of proximity will vary somewhat according to the gravity of the evil apprehended, *Steele v. Curle*, 4 Dana, 381, 385-388, *Hanauer v. Doane*, 12 Wall. 342, 346, *Bickel v. Sheets*, 24 Ind. 1, 4, and in different courts with regard to the same or similar matters. Compare *Hubbard v. Moore*, 24 La. An. 591, *Michael v. Bacon*, 49 Mo. 474, with *Pearce v. Brooks*, L. R. 1 Ex. 218. But the decisions tend more and more to agree that the connection with the unlawful act in cases like the present is too remote. *M'Intyre v. Parks*, 3 Met. 207. *Sortwell v. Hughes*, 1 Curt. C. C. 244, 247. *Green v. Collins*, 3 Cliff. 494. *Hill v. Spear*, 50 N. H. 253. *Tracy v. Talmage*, 4 Kernan, 162. *Distilling Co. v. Nutt*, 34 Kans. 724, 729. *Webber v. Donnelly*, 33 Mich. 469. *Tuttle v. Holland*, 43 Vt. 542. *Braunn v. Keally*, 146 Penn. St. 519, 524. *Wallace v. Lark*, 12 So. Car. 576, 578. *Rose v. Mitchell*, 6 Col. 102. *Jameson v. Gregory*, 4 Met. (Ky.) 363, 370. *Bickel v. Sheets*, *Hubbard v. Moore*, and *Michael v. Bacon*, *ubi supra*.

Although a different rule was assumed in *Suit v. Woodhall*, 118 Mass. 391, it will be seen that it equally was assumed by the instructions given at the trial, and that the exceptions and the point decided in that case concerned only the imputation to the plaintiffs of their agent's knowledge. *M'Intyre v. Parks* never has been overruled. *Dater v. Earl*, 3 Gray, 482. *Webster v. Munger*, 8 Gray, 584, 587. *Adams v. Coulliard*, 102 Mass. 167, 172. *Milliken v. Pratt*, 125 Mass. 374, 376.

Exceptions to the admission of letters of the plaintiffs' agent to them for the purpose of showing what they knew are not argued.

Exceptions overruled.

JOSEPH A. HENDRIE & another vs. CITY OF BOSTON.

Suffolk. March 14, 1901. — May 22, 1901.

Present: HOLMES, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Sewer. Contract, Rescission. Estoppel.

One owning land on the line of a proposed sewer in Boston agreed with the street commissioners and the head of the sewer department that he would convey to the city his land within the lines of a new street where the sewer was to run, in consideration that nothing should be paid for sewer assessments on his adjoining property or for the right to enter the sewer therefrom, and conveyed the land. Subsequently it was voted by the aldermen, with the approval of the mayor, that the assessments for this sewer be assumed by the city on account of the adjoining estates not being benefited by the sewer. A permit to connect the premises with the sewer was issued by the sewer department and the connection was made. A purchaser of this land, on inquiring before his purchase at the collector's office and the sewer department, was informed that there were no assessments or charges against the land. Later this purchaser sued the city for injuries from an overflow of the sewer caused by the alleged negligence of the city. The defence relied upon was that the plaintiff's drain was not lawfully connected, because there was no payment before entering the drain at the rate of two cents per square foot of all land benefited by the connection, as required by the Rev. Ord. of Boston of 1885, c. 27, § 15. Held, that, even if for any reason the city had a right to repudiate its bargain, and if the issue of the permit was beyond the power of the sewer department, the city could not repudiate its agreement while still holding the land conveyed to it, and that until he had notice to the contrary the plaintiff had a right to rely on the information which he had received from the city and to assume that he was entitled to protection as one lawfully connected with the sewer.

HOLMES, C. J. This is an action for damages caused by the overflow of a sewer which was allowed to get out of repair and choked by the negligence of the defendant. The sewage backed up through the plaintiff's drain, and the only defence relied upon is that his drain was not lawfully connected. The ground of the contention is that there was no payment, before entering the drain, at the rate of two cents per square foot of all land benefited by the connection as required by the Revised Ordinances of Boston, 1885, c. 27, § 15.

The plaintiff's predecessor agreed with the street commissioners, St. 1870, c. 337, § 2, and the head of the sewer department that he would convey land within the lines of Talbot Avenue, where the sewer ran, in consideration that nothing be paid for sewer assessments on this property or for the right to enter the sewer, and conveyed the land. *Livingstone v. Taunton*, 155 Mass. 363. This land the city still holds, and in no way has repudiated the bargain except as its counsel now attempts to do so. Subsequently it was voted by the aldermen, with the approval of the mayor, that the assessments for this sewer be "assumed by the city on account of said estates not being benefited by said sewer." *Sheridan v. Salem*, 148 Mass. 196. A permit to connect the premises with the sewer was issued by the sewer department, and the plaintiff before purchasing went to the collector's office and to the sewer department and inquired whether there were any assessments or charges against the land and was answered no.

It does not seem necessary to do much more than to state the facts. If for any reason the city had a right to repudiate its bargain, and if the issue of the permit was beyond the power of the sewer department, contentions to which we give no encouragement but simply do not consider further than to repeat that the city still holds the land conveyed to it, until he had notice to the contrary the plaintiff had a right to rely upon the information which he received, and to assume that he was entitled to protection as one lawfully connected with the sewer.

Exceptions overruled.

S. M. Child, for the defendant.

E. R. Anderson, for the plaintiffs.

MARLBOROUGH ASSOCIATION vs. SAMUEL S. PETERS.

Suffolk. March 15, 18, 1901. — May 22, 1901.

Present: HOLMES, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Corporation, Officers.

Pub. Sts. c. 106, § 24, providing for officers of corporations holding over until their successors are chosen and qualified, does not prevent the termination of the holding by mutual understanding before a permanent successor is appointed.

A treasurer of a corporation is bound to keep the money of the corporation distinct, and, if he appropriates it and makes himself a debtor by wrong instead of an agent, he may be sued by the corporation at once, whether his office continues or not.

HOLMES, C. J. This is an action by a corporation formed under Pub. Sts. c. 115, against a defaulting treasurer. There was no question of the default, and no defence upon the merits, but the defendant asked for a ruling that the action was brought prematurely, since it did not appear that the defendant was not still treasurer and entitled to hold the money. This ruling was refused, and the defendant excepted.

Pub. Sts. c. 106, § 24, providing for officers holding over until their successors are elected, does not prevent the termination of an office by mutual understanding before a permanent successor is appointed. The plaintiff, after electing a new treasurer and his refusal to serve, elected one Gray temporary treasurer for the purpose of effecting a settlement with the defendant. Gray wrote to him and received promises, and afterwards Gray and the officers of the plaintiff made a demand upon the defendant for the plaintiff's property. The dealings plainly implied an agreement of both sides that the defendant's office was at an end, and warranted a finding to that effect. Furthermore, a treasurer holding money of a corporation is bound to keep it distinct, and, if he appropriates it and makes himself a debtor by wrong instead of an agent, he may be sued by the corporation at once, whether his office continues or not.

Exceptions overruled.

W. J. Williams, for the defendant.

C. G. Morgan, for the plaintiff, submitted the case on a brief.

BOSTON AND MAINE RAILROAD *vs.* JOHN M. GRAHAM.

SAME *vs.* INTERNATIONAL TRUST COMPANY.

SAME *vs.* MARCUS MORTON.

SAME *vs.* ALFRED C. VINTON, executor.

Suffolk. March 18, 1901. — May 22, 1901.

Present: HOLMES, C. J., BARKER, HAMMOND, & LORING, JJ.

Corporation, Ratification of Lease, Stockholders dissenting under St. 1900, c. 426, § 3, Jurisdiction under that section.

St. 1900, c. 426, ratifying the lease of the road of the Fitchburg Railroad Company to the Boston and Maine Railroad, provided in § 3, that dissenting stockholders of either the lessor or the lessee might file with the clerk of the lessee writings declaring their dissent and that the shares of such dissenting stockholders should be acquired by the lessee, being valued as required by the act. It further provided that "Within thirty days from the filing of any stockholder's dissent, as above provided, the lessee shall file its petition with the supreme judicial court sitting within and for the county of Suffolk, setting forth the material facts and praying that the value of such dissenting stockholder's shares may be determined," and that thereupon after notice the court shall require the dissenting stockholder's certificate of stock to be deposited with the clerk of the court and shall appoint three commissioners to ascertain and report the value of the shares. Under this provision, the lessee filed petitions against certain holders of the preferred stock of the lessor who had filed their written dissent under the above provision, alleging that the respondents or the persons whose shares they held voted for the approval of the lease and were not entitled to the rights of dissenting stockholders, and prayed for a decree that the respondents were not entitled to have their shares purchased by the lessee under the above provisions or, in the alternative, if the respondents were so entitled, that they might be ordered to deposit their certificates and that commissioners might be appointed to appraise the value of their shares for purchase by the lessee. *Held*, that under the provisions of the section above named the court had jurisdiction to declare that the respondents were not entitled to the rights of dissenting stockholders under the act, as well as to grant the alternative relief in case they were so entitled, it being more convenient to allow the petitioner to try all questions in one proceeding than to require it to file a separate additional bill, the petitioner having to proceed within thirty days by the terms of the statute and there not being time to try first the one question and then the other.

St. 1900, c. 426, ratifying the lease of the road of the Fitchburg Railroad Company to the Boston and Maine Railroad, provided in § 3 as follows: "Every stockholder of either the lessor or the lessee shall be deemed to assent to the contract of lease authorized by this act, unless within ninety days from the first day of July in the year nineteen hundred he shall file with the clerk of the lessee a writing declaring his dissent therefrom. . . . The shares of any stockholder dissenting as above specified shall be acquired by the lessee and shall be valued and the value thereof be paid or tendered or deposited to or for the account of

such stockholder." *Held*, that this provision did not require the lessee to buy the shares of stockholders who voted for the lease and then after the passage of the statute filed written declarations of dissent.

FOUR PETITIONS under § 3 of St. 1900, c. 426, entitled "An Act to ratify and confirm the contract of lease between the Boston and Maine Railroad and the Fitchburg Railroad Company," brought by the Boston and Maine Railroad, the lessee, severally against John M. Graham, the International Trust Company, Marcus Morton, and Alfred C. Vinton, executor under the will of Stephen H. Cutter, holders of preferred stock of the Fitchburg Railroad Company, the lessor, filed at different dates from October 27, 1900, to February 12, 1901.

In each case the respondent demurred.

The cases were heard by *Lathrop, J.*, who at the request of the parties reserved them upon the petitions and demurrers for the consideration and determination of the full court.

St. 1900, c. 426, by its terms was made to take effect upon its passage.

The first sentence of the first section of that statute is as follows: "The contract of lease between the Boston and Maine Railroad and the Fitchburg Railroad Company, as heretofore approved by a majority of the stockholders of each corporation at meetings called for the purpose, is ratified and confirmed, and the lessor and lessee and each of them are hereby granted all power and authority necessary and proper to give the terms of said contract full operation and effect."

In the contract of lease the Fitchburg Railroad Company was the lessor, and the Boston and Maine Railroad the lessee. The second section of the statute authorized the sale to the lessee, for \$5,000,000, payable in three per cent bonds, of fifty thousand shares of the common stock of the lessor owned by the Commonwealth, and also sanctioned the issue, pursuant to the terms of the lease, of bonds by the lessee for the purchase by the lessee, upon the same terms, of the remainder of the common stock of the lessor held by private owners.

In the third section of the statute it was provided that "Every stockholder of either the lessor or the lessee shall be deemed to assent to the contract of lease authorized by this act, unless within ninety days from the first day of July in the year nine-

teen hundred he shall file with the clerk of the lessee a writing declaring his dissent therefrom and stating the number of shares held by him and the number of the certificate or certificates evidencing the same: . . . The shares of any stockholder dissenting as above specified shall be acquired by the lessee and shall be valued and the value thereof be paid or tendered or deposited to or for the account of such stockholder in the manner following:” This section further made it the duty of the lessee, within thirty days from the filing of any such dissent, to file its petition with the Supreme Judicial Court for the county of Suffolk, setting forth the material facts, and praying that the value of such dissenting stockholder’s shares might be determined, followed by further provisions in the same section establishing a method for a valuation of such dissenting stock, first by three commissioners, and after their report, upon the request of either party, by a jury, and for the payment by the lessee of such value of such dissenting stock when thus finally ascertained to the respective holders thereof, and the acquisition thereby of such stock by the lessee as its own property. Among other powers conferred by this section upon the court was the following: “Said court may make all such orders for the enforcement of the rights of any party to the proceeding, — for the consolidation of two or more petitions and their reference to the same commissioners; or for the consolidation of claims for a jury and the trial of two or more cases by the same jury; and for the payment of interest upon the value of the stockholder’s shares, as determined, and the payment of costs by one party to the other, — as justice and equity and the speedy settlement of the matters in controversy may require.”

Each of the petitions alleged that the respondent therein named had filed, as a holder of the preferred stock of the lessor, with the petitioner’s clerk, within the time limited in the statute, his writing declaring his dissent from the contract of lease, and further proceeded to set forth facts, by reason whereof it was alleged by the petitioner that the respondent in each case was not entitled to the benefits of the third section of the statute, which required the petitioner in effect to become the purchaser of the shares of dissenting stockholders of either the lessor or the lessee.

The petition against Graham alleged as the reason why he was not entitled to dissent, that the lease was approved by a majority of the stockholders of the Fitchburg Railroad Company, at a meeting held for the purpose on March 21 and 22, 1900, and that Graham was present at this meeting and voted his stock in favor of approving the lease.

The petition against the International Trust Company alleged as the reasons why that company was not entitled to dissent, that on June 30, 1900, the day when the statute took effect, the trust company was not the registered holder of any shares of the Fitchburg Railroad Company, and did not become the registered holder of the three hundred and fifty shares specified in its notice of dissent until September 27, 1900; that on March 21, 1900, the registered holder of these three hundred and fifty shares was the Treasurer and Receiver General of the Commonwealth, from whom the title passed by assignment dated June 4, 1900, to trustees for the National Assurance Company of Ireland, and from these trustees to the International Trust Company by assignment dated June 5, 1900; also that the lease was approved by a majority of the stockholders of the Fitchburg Railroad Company, at a meeting held for the purpose on March 21 and 22, 1900, and that the Treasurer and Receiver General of the Commonwealth, the then holder of the three hundred and fifty shares, was present at this meeting and voted these shares in favor of approving the lease.

The petition against Morton alleged as the reason why he was not entitled to dissent, that on June 30, 1900, the day when the statute took effect, Morton was not the registered holder of any shares of the Fitchburg Railroad Company, and did not become the holder of the fifty shares specified in his notice of dissent until August 25, 1900; also that the lease was approved by a majority of the stockholders of the Fitchburg Railroad Company, at a meeting held for the purpose on March 21 and 22, 1900, and that the then holders of these fifty shares, since acquired by Morton, were present at this meeting and voted these shares in favor of approving the lease.

The petition against Vinton, executor, alleged as the reason why he was not entitled to dissent, that the lease was approved by a majority of the stockholders of the Fitchburg Railroad

Company, at a meeting held for the purpose on March 21 and 22, 1900; and that neither Vinton, executor, nor his testator was then the registered holder of any of the twenty shares of stock specified in his notice of dissent, but that these shares since had been transferred to Vinton as such executor; also that the then holders of thirteen of the twenty shares were present at the meeting of the stockholders and voted these thirteen shares in favor of approving the lease. It was not alleged that Vinton, executor, was not the owner of the thirteen shares on June 30, 1900, nor that he first became the registered holder thereof after that date.

The respondents severally demurred to the petitions, substantially on two grounds:

First: That the court had no jurisdiction to determine whether the respondents were or were not entitled to dissent from the contract of lease; but had under the statute jurisdiction only to appoint commissioners to ascertain the value of the shares.

Second: That the facts set forth by the petitioner in each case, as the reasons why the several respondents had no right to dissent from the contract of lease, were not sufficient in law to deprive them of that right.

R. M. Morse, for the respondents.

L. S. Dabney, for the petitioner.

HOLMES, C. J. These are petitions brought under St. 1900, c. 426, for the purpose of having determined the value of stock belonging to stockholders in the Fitchburg Railroad who dissent from the lease of that road to the Boston and Maine Railroad sanctioned by the above named act. The petitions also have an alternative aspect, and allege that the respondents, or earlier holders of their stock, voted in favor of the lease at a meeting held on March 21 and 22, 1900, and that therefore they are not entitled to dissent or to have their stock valued and purchased. Two of the petitions also allege that the respondents were not stockholders at the date of the passage of the act, and for that reason also are not entitled to the benefit of it. The respondents demur on the grounds that the court under the act has jurisdiction only to appoint commissioners, and cannot determine the questions raised, and that the facts alleged do not deprive the respondents of the benefits of the act.

We shall spend no time on the question of procedure. The petitioner had to proceed within thirty days by the terms of the statute. If it did not buy dissenting stock under the statute, it had to take the risk of the lease being held to be void as against the dissenting holders. *Dow v. Northern Railroad*, 67 N. H. 1. See *Durfee v. Old Colony & Fall River Railroad*, 5 Allen, 230. Of course it was not bound to admit the right of the stockholder to dissent, *Moore v. Sanford*, 151 Mass. 285, 286, and it is more convenient to allow it to try all questions in one proceeding than to put it to a separate bill, and merely to allow it to save its rights in this proceeding by a *protestando*. It is unnecessary to consider whether, if there were time to try first the one question and then the other, we should adopt a different rule, as in *Smith v. Valence*, 1 Rep. Ch. 90, a bill to redeem with an attempt to dispute the mortgage, or as in the case of a statutory petition for a jury to assess damages for a taking by eminent domain. *Pitkin v. Springfield*, 112 Mass. 509.

The more important question raised by the demurrers is whether the statute, as a condition of its ratification of an already executed lease, required the lessee, the petitioner, to buy all the stock of any member of either corporation, lessor or lessee, that saw fit to file a written declaration of dissent, although he previously had taken part in the corporate act by which the lease was made, and had voted for it upon the same stock which he now undertakes to sell. It seems to us unreasonable to suppose that the obligation of the lessee was meant to be so large.

Apart from the statute, of course those who had voted for the lease could not complain. *Boston, Concord & Montreal Railroad v. Boston & Lowell Railroad*, 65 N. H. 393, 400. The statute recognizes that the lease has been approved by a majority of the stockholders, and imparts its authority in the form of a ratification. "The contract of lease . . . as heretofore approved by a majority of the stockholders of each corporation . . . is ratified and confirmed." It seems unlikely that an act thus made irrevocable in its effect upon the corporation should be intended at the same moment for the first time to become revocable as to the member who did it. It is unlikely that the Legislature should see any justice in giving to such a member a

right to compel the corporation to buy him out, when such a right never would have been thought of except as a constitutional means of meeting *bona fide* dissent from an act for which he was responsible. See N. H. St. 1889, c. 5; Pub. Sts. c. 156, § 28. A similar result was reached without the aid of statute in *Treadwell v. Salisbury Manuf. Co.* 7 Gray, 393, 406.

Apart from the theoretic absurdity to which the respondents' construction of the statute would lead, that is to say, the possibility that the petitioner might be required to buy all its own stock as well as all that of the lessor, it very well might lead in fact to a relation essentially different from that contemplated by the act, because it very well might result in the lessee becoming the principal owner of the stock of the lessor.

The respondents base their argument upon the words of the act, but the words of the act are far less stringent than the argument implies. It is true that in § 8 the words "every stockholder" occur. But the provision is that every stockholder shall be deemed to assent to the contract unless he shall file his dissent within ninety days,—which is very different from a provision that every stockholder may file a dissent. The universality of "every" is directed toward the obligation to dissent within a certain time, not to the right to dissent, which is left to be determined by whatever tests may be proper. The strongest and indeed the only phrase from which an argument can be drawn comes later. "The shares of any stockholder dissenting as above specified shall be acquired by the lessee." But here, again, the universality of the word "any" as easily may be taken as applying to stockholders having a right to dissent otherwise determined, as to all the stockholders of both roads. One interpretation is as idiomatic and natural as the other, and in our opinion that which we adopt is the only one consistent with justice and sense.

Demurrers overruled.

JOHN KEOHANE, petitioner.

Suffolk. March 19, 1901. — May 22, 1901.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

Practice, Civil, Exceptions. Replevin, Nonsuit, Damages for breach of replevin bond.

If there has been no preliminary understanding or arrangement for saving a party's rights, it is too late to except to a finding as unwarranted by the evidence after it has been made. The rule is the same when the finding is made by a judge as when made by a jury.

Seemle, that when in replevin there has been a judgment for a return upon a nonsuit followed by a breach of the replevin bond by a failure to return the property, a surety on the bond has a right to show that the defendant in replevin had no title.

Where there has been a breach of a replevin bond by a failure of the plaintiff in replevin to return the goods on an order for a return, whether a surety on the bond by showing that the defendant in replevin was a bailee could reduce the damages recoverable to the value of his special interest, *quære*.

PETITION to prove exceptions of the defendant in the case of *Norman Y. Brintnall v. John Keohane*, an action on a replevin bond. Writ in the Municipal Court of the city of Boston dated May 10, 1900, case entered in the Superior Court on appeal August 1, 1900, petition filed January 11, 1901.

The case was tried in the Superior Court by *Hardy, J.*, without a jury. The preceding replevin suit in which the bond was given was brought by one John F. Leonard against the present plaintiff Norman Y. Brintnall. In that suit a coupé and a harness were replevied. The replevin suit was entered in court, and thereafter Leonard, the plaintiff therein, was nonsuited, and an order was made for a return of the property replevied. The property was not returned, and this action on the replevin bond was brought by Brintnall, the defendant in the replevin suit, against the present defendant, one of the sureties on the bond, who is the petitioner to prove exceptions. The defendant admitted the execution of the bond by him as surety, and a breach of the condition, in that the order for the return of the property had not been complied with, and went to trial upon the question as to the sum for which in equity and good conscience execution should issue.

The plaintiff, Brintnall, testified that he held the coupé and harness at the time they were replevied on account of a lien he had thereon, given by one Michael Leonard, a brother of John F. Leonard, to secure a debt to Brintnall from Michael amounting to \$275; and also testified that he held a horse as security for the same debt at the time of the service of the replevin writ, and had kept and used the horse as his own property ever since that time, a period of seven and one half years. During the cross-examination of Brintnall a discussion arose as to the right of the defendant, Keohane, to show that Michael Leonard had no title to the property nor any authority to pledge or give a lien upon it, and the defendant contended that if Michael Leonard had no such title or authority the plaintiff would be entitled to recover only nominal damages; and further contended that, in case the judge should find that Michael Leonard had title and authority to create a lien on the property, then the plaintiff would be entitled to recover only such part of the debt as remained due from Michael to the plaintiff, together with interest and costs. Thereupon the judge ruled that he would admit the evidence of the defendant tending to establish his contentions *de bene*, and would consider and determine the questions raised by the defendant at the argument of the case. The plaintiff testified to the value of the coupé, harness and horse.

The defendant offered as a witness John F. Leonard, who testified that the coupé and harness at the time of the service of the replevin writ were his property; that he bought the coupé of one Stevens, and the harness of one Donohoe, and that he allowed Michael to use the coupé and harness for a share of the profits which Michael might make in his business as hack driver. The witness also testified as to the value of the horse, harness and coupé.

At the close of the evidence, the counsel for the defendant in his argument discussed the propositions contained in his contentions as above stated, and orally asked the judge to rule in accordance with his contentions; and was proceeding to put his requests for such rulings in a formal manner when the judge stated that the defendant was too late to make any such requests, refused to hear the defendant's counsel thereon or to

permit the defendant to make his requests for rulings at that time, and ordered the plaintiff's counsel to proceed with his argument.

The next day the judge sent to the clerk of the Superior Court a finding for the plaintiff in the penal sum of the bond, and an order that execution should issue for the sum of \$465.97, and made a memorandum or statement on the paper on which the finding was written as follows: "See *Stevens v. Tuite*, 104 Mass. 328, for rule in computation of damages, pages 334, 335." Within twenty days the defendant filed his bill of exceptions to the refusals to rule and to the ruling or statement made as to the computation of damages. These exceptions were disallowed by the judge in writing as follows:

"This bill of exceptions is disallowed for the reasons that the defendant is not entitled to any exception. No requests for rulings either oral or written were made by the defendant previous to the termination of the closing argument of the defendant's counsel. When the said counsel had finished his argument and the plaintiff's counsel arose to reply, I stated to the latter that I did not care to hear him argue any question except the one of the damages. Then for the first time the counsel for the defence attempted to make a request for rulings which I declined to hear because he was too late, and he had not complied with the forty-eighth rule of the court. I made no specific rulings under *Stevens v. Tuite*, 104 Mass. 334, 335, which entitles the defendant to an exception. The plaintiff's counsel in his argument claimed that the damages should be assessed in a much larger sum than the amount found by me in this case. I suggested to such counsel in the course of the trial and argument that the case cited established a different rule than the one claimed by him. As I assessed the damages contrary to the contention of the plaintiff, at the foot of the finding which I made, I simply wrote the words, 'See *Stevens v. Tuite*, 104 Mass. 334, 335,' for the benefit of the plaintiff's counsel."

Thereupon the petition to prove exceptions was filed, and Charles A. Williams, Esquire, was by this court appointed commissioner to hear the parties and their evidence, settle the truth of the exceptions, and report thereon to the court.

The commissioner filed his report in which he reported the

evidence presented before him, and, among other findings, found "that the petitioner, John Keohane, during the trial on the replevin bond did not allege, take, or save any exceptions to any opinion, ruling, direction, or judgment of the court in matter of law."

Rule 48 of the Superior Court is as follows:

"No exception shall be allowed by the presiding justice, unless the same be alleged and saved at the time when the opinion, ruling, direction, or judgment excepted to is given. And all exceptions to any charge to the jury shall, unless previously saved, be alleged before the jury are sent out. When further instructions are given in the absence of counsel after the jury have retired, the presiding justice may permit exceptions thereto at any time within twenty-four hours next following. All requests for instructions shall be made in writing before the closing arguments unless special leave is given to present further requests later."

W. B. Orcutt, for Keohane, contended, that Rule 48 of the Superior Court does not apply to a case heard by a judge without a jury, and that, in the case at bar, the judge admitted *de bene* the evidence offered by the defendant and no ruling was given at the trial and there was then nothing to except to.

A. E. Burr, for Brintnall.

HOLMES, C. J. This is a petition to prove exceptions. The commissioner to whom the case was referred finds that during the trial the petitioner did not take or save any exceptions. It is certain that no requests for instructions were made in writing before the closing arguments, as required by Rule 48 of the Superior Court, and although we assume on the testimony that the counsel for the petitioner understood that he had what amounted to special leave to present requests later, we do not perceive the implication of such leave in a postponement of discussion of a question raised on evidence to the arguments, or any reason why, if the requests would have been in time, they should not have been presented in writing.

The argument most pressed is that, in a case tried before a judge alone, if the judge bases his finding upon a ruling of law, the party aggrieved has the right to except to such ruling, and that the judge did that in this case. The judge found for the

plaintiff, and on the back of the memorandum of the finding was written "See *Stevens v. Tuite*, 104 Mass. 328, for rule in computation of damages, pages 334, 335." This is what the defendant relies upon. But the judge in disallowing the bill of exceptions certified that he "made no specific rulings under *Stevens v. Tuite*, 104 Mass. 334, 335, which entitles the defendant to an exception," and explained that the reference to the case was in answer not to the defendant's but to the plaintiff's contention, and was intended to show why he did not give the plaintiff larger damages in accordance with his claim. But the judge found substantial damages, and the defendant had been directing his main defence to the proposition that the plaintiff could recover nominal damages only. The judge therefore ruled by implication that the evidence warranted a finding of substantial damages. It may be urged that the correctness of this implied ruling is open.

But, in our opinion, if a party wishes to save a question of law upon the evidence, he must do so before the trial is over, and cannot raise it for the first time by what may be an afterthought, although it was not so in this case. If a judge should leave a case to a jury upon a wrong ruling, it would be too late to except after a verdict had been returned. The rule is the same when the finding is by the judge. If there has been no preliminary understanding or arrangement for saving a party's rights, it is too late to except to a finding as unwarranted by the evidence after it has been made. When the finding is recorded nothing on the face of the record shows that the excepting party is aggrieved, and at that stage there is no right to make the evidence a part of the record in order to establish the grievance.

We should have thought in this case that the petitioner had been dealt with too technically, and had been prevented from saving rights which he obviously meant and tried to save, were we not convinced that the judge's finding of facts cut the ground from under the propositions of law relied upon by the petitioner and that that was the reason for the somewhat summary treatment which his counsel received. We think also that the finding was warranted by the evidence. To state our view a little more fully, although it is not within the scope of our decision,

if we assume that a surety on a replevin bond when the judgment for a return was on a nonsuit has a right to show that the defendant in replevin had no title, (*Easter v. Foster*, 173 Mass. 39, 40,) the evidence in this case warranted a finding that there had been an implied consent of all parties in interest that the defendant in replevin, the present plaintiff, should have the title to the replevied goods. Whether it would have mitigated damages to show that the defendant in replevin was a bailee need not be considered. Compare *Leonard v. Whitney*, 109 Mass. 265, 268, 269, with *Brewster v. Warner*, 136 Mass. 57.

Petition dismissed.

EDMUND R. CUMMINS vs. DUNCAN CHRISTIE & trustee.

Worcester. October 2, 1900. — May 23, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, & HAMMOND, JJ.

Tax, Sale, Enforcement in trustee process of lien of mortgagee on surplus proceeds.

A mortgagee of land sold for taxes may enforce as claimant in a trustee process his equitable lien upon the surplus proceeds of the sale in the hands of the city or town. If the mortgage does not cover the whole of the proceeds, an attaching creditor of the mortgagor, plaintiff in the trustee process, is entitled to the balance in the hands of the trustee after the claim of the mortgagee is satisfied.

CONTRACT on a promissory note against one Duncan Christie as defendant and the city of Worcester as trustee. Writ in the Central District Court of Worcester dated February 28, 1900, case entered in the Superior Court on appeal of the trustee May 7, 1900.

The answer of the trustee alleged that on May 1, 1898, a certain tract of land situated on Dewey Street in the city of Worcester, was owned by one David A. Curry, and on that day the assessors of the city of Worcester assessed a tax upon this land in the name of Curry; that thereafter Curry conveyed the land, and that on August 17, 1899, the record title to the land stood in the name of the defendant, Duncan Christie, subject to two mortgages given by Christie on October 15, 1898; that, the tax

remaining unpaid, the land was duly advertised for sale on August 17, 1899, and was sold by the city for the sum of \$105; that the sum of \$30.12 was applied in payment of the tax with interest and costs of sale, and that the balance of the first mentioned sum, amounting to \$74.88, was held by the trustee for the owner of the real estate in accordance with the provisions of St. 1888, c. 390, § 40. The answer further alleged that at the time of the commencement of this suit the record title to the land stood in the name of Arthur B. Nelson, subject to a mortgage to one William B. Clark.

On June 4, 1900, William B. Clark as claimant filed a motion in the Superior Court asking to be made a party and alleging that as mortgagee of the land he was entitled to receive from the city of Worcester the balance of the proceeds of the tax sale remaining in its hands. On the same day the Superior Court gave judgment charging the trustee on its answer, and from the order so charging it the trustee appealed.

A. P. Rugg, for the trustee.

No counsel appeared for any of the other parties.

HAMMOND, J. This is an action brought originally in the District Court, where the trustee was charged upon its answer. It appealed to the Superior Court, where it was again charged on its answer. The case is before us upon an appeal from that order, and was submitted upon the brief of the trustee, no other party appearing. William B. Clark voluntarily appeared in the Superior Court as a claimant and filed a statement of his claim, but nothing more appears in the record concerning it. The only question therefore, is whether, in this state of the record, upon the facts stated in the answer, the trustee should be charged. Briefly stated, the answer discloses that the city has in its hands money, being the balance of the proceeds of land sold for non-payment of taxes after satisfying the taxes and charges; that at the time of the tax sale the record title to the land stood in the name of the defendant, subject to two mortgages theretofore given by him, and that, at the time this suit was commenced, it stood in the name of one Nelson, subject to a mortgage to the claimant. The answer further states that it holds this money for the owner of the real estate in accordance with the provisions of St. 1888, c. 390, § 40, by which we understand the trustee to

mean that the money is held for the person entitled to it under that statute upon the facts stated.

The statute directs the city to pay such proceeds to the owner of the land at the time of the sale. In *Worcester v. Boston, ante*, 41, it has been recently decided that the term "owner," as used in that section, does not include a mortgagee, unless either he is in possession at the time of the sale or the mortgage is of the kind described in Pub. Sts. c. 11, § 14, and has been assessed to him as real estate; but it was also decided that, while as between the owner and the city the money belonged to the owner, yet as between him and a mortgagee at the time of sale the latter had an equitable lien upon such proceeds which he could enforce in equity. And we can have no doubt that, where such a mortgagee appears as a claimant in a suit like this, he stands, so far as respects the rights of the attaching creditor, in a situation analogous to that of an assignee of the defendant's interest in the fund to the extent at least of the sum due on the mortgage, and that to that extent the trustee should not be held. The answer of the trustee seems loosely drawn, but we construe it to mean that the mortgage held by Clark, the claimant, at the time of the commencement of the suit, was one of the mortgages in existence at the time of the tax sale, and was then held by him.

Under this construction of the answer, the title of the claimant to the fund in the possession of the trustee to the extent of his claim is better than that of the owner, and, no fraud being shown, the attaching creditor can have no higher right than his debtor. The claimant is entitled to so much of the fund as his mortgage will cover, but if there be anything left the plaintiff can hold it. Since, however, there is nothing in the answer to show that the sum due on the mortgage is equal to that which the trustee discloses in his possession, the trustee must be charged.

Order charging trustee affirmed.

EDWARD A. BANGS & others vs. JOHN B. FALLON & others.

Suffolk. December 3, 1900. — May 23, 1901.

Present: HOLMES, C. J., KNOWLTON, LATHROP, HAMMOND, & LORING, JJ.

Mortgage, Necessary expenses of foreclosure sale, Construction of agreement to pay interest, Terms of mortgage note incorporated by reference, Interest on surplus proceeds of foreclosure sale.

In a suit in equity against a mortgagee to have the surplus of the proceeds of a foreclosure sale applied to the plaintiff's claim, the mortgagee is entitled to be allowed for counsel fees incurred by him in preventing or removing an injunction to restrain the foreclosure proceedings, this being a reasonably necessary expense of those proceedings.

A mortgagee is entitled to be allowed a fee paid by him to an auctioneer for his services in conducting a foreclosure sale, if it appears that he paid in good faith no more than the usual price for such services, although there is a reasonable probability that by searching among auctioneers he might have found one who would have undertaken to conduct the sale for a smaller compensation.

A mortgage note read as follows: "For Value Received, I promise to pay to A. B. or order \$30,500, in three months from this date, with interest to be paid monthly at the rate of one and one half per centum per month, during the said term, and until the said sum is paid in full." The note was secured by a mortgage on land on which the promisor was about to erect a block of buildings, and the consideration for the note was a written agreement for a building loan whereby the mortgagee agreed to advance to the mortgagor the sum of \$30,500 in specified instalments from time to time as the work on the buildings progressed. The agreement provided that the mortgagee should not in any case be liable to make any of the stipulated payments after foreclosure of the mortgage. The note, mortgage and agreement were all delivered as one transaction about a month after the date of the note. Thereafter advances were made from time to time in accordance with the agreement until the mortgagor made default and the mortgage was foreclosed. *Held*, that the legal effect of the contract was that the mortgagee should have interest upon the full amount of the principal of the note from the date of the note and so long as he was under a legal obligation to furnish the money, whether it was set apart or not, and that this obligation ceased only upon the foreclosure of the mortgage.

A mortgage note provided that interest thereon should be paid monthly at the rate of one and one half per centum per month. The mortgage stated the condition to be the payment of a certain sum of money, "with interest, as expressed in the note hereby secured," without naming any rate of interest. It was contended, that the mortgage stated the rate of interest only by reference to a private unrecorded document and thereby failed to comply with the registration laws, and that no rate of interest being named in the mortgage the rate must be six per cent per annum under Pub. Sts. c. 77, § 3. *Held*, that the mortgage deed gave notice that some interest was to be paid and the rate and times of payment were stated in the note, and the reference to the note was sufficient to put persons having claims subject to the mortgage upon inquiry.

If a mortgagee, who holds a surplus from the proceeds of a foreclosure sale, keeps no special deposit of the balance in his hands after satisfying his claims, and there is nothing to show that he has not used the money in his business, he is chargeable with interest upon the surplus from the date of the sale when he received it.

BILL IN EQUITY by eight creditors of Benjamin F. Kenerson against John B. Fallon, Benjamin F. Kenerson, Royal B. Kenerson and Ellen P. Kenerson, for an account of the surplus proceeds of a foreclosure sale in the hands of the defendant Fallon, as mortgagee under a mortgage made by the defendant Benjamin F. Kenerson and foreclosed by Fallon, and a distribution of such balance of purchase money among the plaintiffs in proportion to their respective claims, filed August 3, 1898, and amended September 6, 1898.

In the Superior Court, the case was referred to Henry S. Dewey, Esquire, as master, and coming on for hearing before *Braley, J.*, was reserved on the pleadings, the master's report and the exceptions thereto and the master's supplemental report for the consideration and determination of this court.

The master's supplemental report related merely to the respective interests of the different plaintiffs. He found that six of the eight plaintiffs at the time of the foreclosure sale had valid liens on the property subject to the mortgage, and fixed the amount of each claim, the total being \$3,645.90.

From the pleadings and report it appeared that the property sold on foreclosure by Fallon consisted of five lots of land with buildings thereon on Norway Street in Boston, and that Benjamin F. Kenerson obtained from Fallon a building loan for the purpose of constructing the houses upon the mortgaged lots. The transaction included an agreement, a mortgage and a note. The agreement was dated September 7, 1897, was under seal and signed by the defendant Fallon and the defendant Benjamin F. Kenerson, and was as follows:

"Whereas Benjamin F. Kenerson has mortgaged to John B. Fallon for the sum of thirty thousand and five hundred dollars a certain parcel of land situated on the northerly side of Norway Street in Boston, being lots numbered forty-nine, fifty, fifty-one and fifty-two and fifty-three . . . and is erecting four houses thereon, said houses to cover the entire width of said estate.

" Now, therefore, the said John B. Fallon hereby covenants and agrees to and with the said Benjamin F. Kenerson, and his heirs and assigns, that he will advance said sum of thirty thousand and five hundred dollars as follows: \$1,400 when the foundations and first floors of said four houses are laid; \$1,000 when the second floors of said four houses are laid; \$700 when the third floors of said four houses are laid; \$700 when the fourth floors of said four houses are laid; \$1,000 when the rough plumbing and steam pipes are in, and roofs are on and tight in all said four houses; \$1,000 when said four houses are strapped and ready for plastering; \$1,600 when said four houses are plastered; \$500 when said four houses are skimmed; \$2,600 when the standing finish in all said four houses is up; \$4,000 when all of said four houses are fully completed and ready for occupancy; and \$3,000 when thirty days shall have expired from the completion of all work on said buildings, provided that at that time the mortgaged premises shall be free from liens for labor or materials whether affecting said mortgagee's interest or not, and from all other encumbrances or defects of title, except those mentioned in said mortgage, which affect said mortgagee's interest adversely, and upon surrender of this agreement.

" And whereas the said premises are subject to three certain mortgages amounting to thirteen thousand dollars . . . which the said Kenerson hereby requests the said Fallon to pay from the remaining moneys secured by the mortgage made to him so far as the same may suffice. Now, therefore, the said Fallon agrees to hold the said sum of thirteen thousand dollars applicable to the payment thereof as above requested.

" But the said Fallon shall be liable to make none of the payments herein above agreed on his part to be made, until a reasonable party wall agreement shall have been executed in relation to the walls between the lots above mentioned and the adjoining owners to the reasonable satisfaction of counsel of said Fallon. Said payments shall be made only in case said mortgagor shall, to the satisfaction of said mortgagee, or of such inspector as he may select, proceed forthwith to erect said four houses . . . and shall use due diligence in the completion of said buildings in a thorough and workmanlike manner.

" A certificate from the building department of said city of

Boston shall be furnished to said mortgagee when said buildings are completed. All reasonable charges for legal services incurred by said mortgagee in connection with the giving of said mortgage and each of said payments shall be paid by said mortgagor and deducted from each payment as it becomes due, but said mortgagee shall not in any case be liable to make any of the foregoing payments after foreclosure of said mortgage. . . .”

After the attesting clause and the signatures came the following signed by Kenerson: “I, Benjamin F. Kenerson, in consideration of the premises, hereby covenant and agree to pay to said John B. Fallon, from and out of the first and second payments hereinbefore agreed upon, the amount of one per cent as commission upon the face of the loan hereinbefore mentioned.”

The mortgage from Benjamin F. Kenerson to the defendant Fallon described in the foregoing agreement was dated August 16, 1897. The condition of the mortgage was as follows: “Provided, nevertheless, that if the said grantor, or his heirs, executors, administrators or assigns shall pay unto the said grantee, or his executors, administrators or assigns, the sum of thirty thousand and five hundred dollars in three months from this date, with interest, as expressed in the note hereby secured, . . . then this deed, as also a certain promissory note of even date herewith, signed by the said grantor, whereby he promises to pay to the said grantee or order the said principal sum and interest at the times aforesaid, shall both be void.”

The power of sale clause contained the ordinary provisions for sale in case of default and provided that the mortgagee might “out of the proceeds of such sale or sales retain all sums then secured by this deed, whether then or thereafter payable, including all sums mentioned in the foregoing condition, and all costs, charges and expenses of advertising and selling as aforesaid, or incurred or sustained by him or them by reason of any default in the performance or observance of the condition of this deed, or of any covenant or agreement herein contained, including a reasonable compensation for his and their own time and services, rendering the surplus, if any, together with an account of all such costs, charges and expenses, to the said grantor or his heirs or assigns.”

The note was as follows:

"\$30,500 x/100. Boston, August 16, 1897. For Value Received, I promise to pay to John B. Fallon or order, Thirty Thousand and Five Hundred x/100 Dollars, in three months from this date, with interest to be paid monthly at the rate of one and one half per centum per month, during the said term, and until the said sum is paid in full; both principal and interest to be paid in gold coin of the United States of America of the present standard of weight and fineness. Benjamin F. Kenerson."

Across the end of the note was printed "Mortgage Note," and below the note was written: "This note is secured by a mortgage of real estate in Norway Street, Boston, to be recorded in Suffolk Registry of Deeds."

The mortgage, the note and the agreement were all delivered as one transaction on September 8, 1897. Fallon purchased the three prior mortgages by paying \$13,000 in accordance with the terms of the agreement, and on various dates from November 6, 1897, to April 27, 1898, made payments to Benjamin F. Kenerson which with the \$13,000 already named amounted to \$23,000, the total of the cash advanced by Fallon to Kenerson under the mortgage.

At some time after April 27, 1898, Fallon, by reason of breach of the conditions of the mortgage, took possession of the premises for the purpose of foreclosing, and on August 24, 1898, the premises were sold under the power of sale. On August 24, 1898, the defendant Fallon paid to Rand, Vinton and Wakefield, his attorneys, as expenses of the foreclosure sale, the total sum of \$171.90, including the following items:

"For services as attorney in connection with adjournment and sale and drafting mortgagee's deed, \$60.

"For services as attorneys in relation to injunction proceedings, these proceedings being upon the original bill herein, and such services being in the matter of obtaining a dissolution of the injunction restraining the defendant Fallon from selling said Norway Street property in the foreclosure proceedings, \$50."

Item 39 in Fallon's account was as follows: "28 Aug. By cash paid A. Spalding Weld, auctioneer, commission on foreclosure sale \$277."

Fallon received in cash as the purchase money from the foreclosure sale \$28,200. He received from Benjamin F. Kenerson

four payments of interest on the mortgage note of \$30,500, as follows: November 19, 1897, for one month's interest to September 16, 1897, \$457.50; December 4, 1897, for one month's interest to October 16, 1897, \$457.50; March 12, 1898, for one month's interest to November 16, 1897, \$457.50; April 27, 1898, for one month's interest to December 16, 1897, \$457.50, the four payments amounting to \$1,830.

The amount of interest on the mortgage note of \$30,500 from the day of its date to the time of the foreclosure sale, that is, from August 16, 1897, to August 24, 1898, one year and eight days, at one and one half per cent per month, was \$5,612.

The total of the several payments made to Fallon was \$30,030, and the total of the several payments made by him and credits due to him was \$29,639.69, thus leaving a balance in the hands of Fallon to be accounted for by him of \$390.31.

After finding the foregoing facts, the master's report continued as follows:

"The plaintiffs contended that inasmuch as the \$30,500 note and mortgage were not delivered before September 7, 1897, and inasmuch as Fallon made no payments on account thereof before that date, Fallon should not be allowed interest on his account for the time before September 7. And the plaintiffs further contended that, inasmuch as the rate of interest was not stated in the mortgage deed, and was only stated in the mortgage note, Fallon in his account should only be allowed interest at the legal rate of six per cent. I find and rule, however, that Fallon is entitled to interest according to the terms of the mortgage note, that is to say, upon the whole sum of \$30,500, from August 16, 1897, and at the rate of one and one half per centum per month until the date of the foreclosure sale. The plaintiffs further contended that Fallon was entitled to interest on his several advances of money only from the date of each advance, or specific setting apart under the contract, to the day of the sale of the premises, but I find and rule that said Fallon is entitled to interest as above mentioned.

"The plaintiffs also contended that Fallon in his account should not be allowed credit for the whole sum of \$277 paid by him to the auctioneer at the foreclosure sale, and that he should

be allowed on that account only the sum of \$50. It appeared in evidence, that the ordinary and customary charge of auctioneers in Boston for such services, in the absence of an express agreement, was at the rate of one per cent on the purchase price, and that the charge of \$277 was so reckoned as a commission of one per cent, and that Fallon believed, as there was reasonable ground for him to believe, that he was liable to the auctioneer for the sum of \$277. It also appeared in evidence that there was reasonable probability that by making search among the auctioneers in Boston he might have found one who would have undertaken to conduct the sale, an express agreement having been made therefor in advance, for an amount not exceeding \$50. I find and rule, however, that Fallon was under no obligation to make such search, and to endeavor to make such express contract, and that he is entitled to credit for the amount actually paid by him to the auctioneer in the sum of \$277.

"The defendant Fallon contended that the amount of his legal expenses in defending this suit should be deducted from the balance in his hands from the proceeds of the foreclosure sale. I find and rule, however, that the amount of such legal expenses are not proper charges in the stating of the account under the decree referring the case to me.

"On or about January 22, 1898, the defendants Royal B. and Ellen P. Kenerson, the father and mother of Benjamin F., conveyed to Fallon, by mortgage deed bearing that date, their residence on Appleton Street in Boston, the same then standing in the name of Ellen P. Kenerson, and being then subject to a prior mortgage also for \$2,000. Fallon advanced the full sum of \$2,000 upon this Appleton Street mortgage, and the proceeds thereof were lent to Benjamin F. Kenerson by his mother and used by him in the construction of the Norway Street houses. This payment of \$2,000 by Fallon was separate and apart from the payments made on account of the \$30,500 mortgage, and no part of the \$2,000 was a part payment on account of moneys due under the Norway Street mortgage.

"The defendant Benjamin F. Kenerson ceased to perform work in the erection of the buildings on Norway Street on or about April 27, 1898, and did practically no work thereon there-

after. On or about June 7, 1898, Benjamin F. Kenerson executed a mortgage deed of the premises on Norway Street to his mother, Ellen P., the mortgage being conditioned for the payment of \$10,000 in one year at five per cent and this instrument was acknowledged by him and by him recorded on June 8, 1898. No consideration passed between Benjamin F. and Ellen P. at the time of the giving of this mortgage, and the same was given by Benjamin F. with the intention of giving security to his mother as his creditor, Benjamin F. being at that time indebted to various parties in sums beyond his ability to pay, because he did not want other creditors to get ahead of her, and because his creditors were putting attachments on his property, and with the intention on his part of putting her in ahead. Benjamin F. Kenerson was then indebted to his mother for moneys advanced and loaned to him from time to time during some four years before the date of the last named mortgage, in the sum of \$7,765.64. No mortgage note was delivered to Ellen P. Kenerson for this \$10,000, and the mortgage deed was not delivered to her in person, but having been left at the Registry of Deeds by Benjamin F. Kenerson in person, the mortgage deed remained in the Registry of Deeds until after the taking of evidence under this reference was begun. Ellen P. had previously requested Benjamin F. to give her a mortgage on the Norway Street property, and he told her one day in the summer of 1898 that he had had one recorded.

"The defendant Fallon testified, and I find, that from the date of the foreclosure sale he has kept no special deposit, or money, set apart as the balance of account on this mortgage matter.

"There was evidence to show, and I find, that the commission of one per cent was received by the defendant Fallon out of the first and second payments, as set forth and provided in the contract.

"There was evidence to show, and I find, that on the day of the foreclosure sale some of the plaintiffs named in the bill had valid liens on the property sold by reason of attachments made subsequent to the delivery of the \$30,500 mortgage, and were creditors for substantial sums."

This last finding was made more definite by the findings of the master's supplemental report already mentioned.

The following exceptions were taken by the plaintiffs to the master's report :

1. That the master was in error in allowing the sum of \$50 for services of Fallon's counsel in relation to injunction proceedings in this suit. 2. That the master was in error in allowing the sum of \$277 as the commission of the auctioneer on the foreclosure sale. 3. That the master was in error in allowing interest on the loan made by Fallon to B. F. Kenerson, or any part thereof, for the time before September 7, 1897, when the mortgage, note and agreement were delivered. 4. That the master was in error in allowing interest on the several advances of loans of money for any time before the actual advancement or specific setting apart of the sums under the contract. 5. That the master was in error in allowing interest on a larger amount as principal than had been actually lent or set apart. 6. That the master was in error in allowing interest on the loan or advances of money at any rate greater than six per centum per annum, no rate whatever having been stated, by sufficient reference or otherwise, in the recorded instruments. 7. That the master was in error in allowing interest at any rate greater than six per centum per annum, — the plaintiffs having no notice of any other rate, and the agreed rate between Fallon and B. F. Kenerson having been concealed, to enable the latter to obtain undue credit and contract debts he was unable to pay.

G. W. Parke, for the plaintiffs.

E. L. Rand, for the defendant Fallon.

C. H. Welch, for the other defendants, submitted the case on a brief.

HAMMOND, J. 1. As to the allowance of \$50 for counsel fees. The bill when filed contained a prayer for injunction against a sale, and this expense was incurred by the mortgagee in preventing or removing an injunction. It was a part of the expense of the foreclosure proceedings, was reasonably necessary, and was therefore rightly allowed.

2. As to the allowance of \$277, paid to the auctioneer for services in selling the property. Upon this the master reports that it appeared in evidence that this charge, being at the rate of one per cent on the purchase price, was the ordinary and customary charge of auctioneers in Boston for such services in

the absence of any express agreement, and that Fallon believed and had reasonable ground to believe that he was liable to the auctioneer for that sum. It further appeared in evidence that there was reasonable probability that by searching among the auctioneers he might have found one who would have undertaken to conduct the sale, an express agreement having been made in advance, for an amount not exceeding \$50. The master ruled that Fallon was under no obligation to make such search, and found that he was entitled to be allowed the sum. We think the master was right. The property was of considerable value, and Fallon may well have thought that, since it was desirable to have an experienced and competent man to conduct the sale, he would be much more likely to find such a person in one who charged the regular rates than in one content to undertake the sale at a much lower rate. In any event he paid in good faith no more than the usual price for such services, and it is no more than just that he should be allowed what he thus paid. .

3. As to the question of interest. The master allowed interest on the face of the note from its date to the time of the sale, at the rate of eighteen per cent per annum, in accordance with its terms. The plaintiffs contend that interest should not be computed upon the note before September 7, 1897, the time of its delivery, and then only upon the payments made, and from their respective dates, and that no interest should be allowed upon money not lent or set apart by the mortgagee.

The note contains an absolute promise to pay in three months from its date the sum of \$30,500, with interest thereon at the rate of one and one half per cent per month; and it is secured by a mortgage of real estate upon which the mortgagor was about to erect a block of buildings. The consideration for the note is to be found in the contemporaneous written agreement. The note, mortgage and agreement, all form part of one and the same transaction; and, by reference to the latter, it is seen that the money was to be delivered by Fallon only by instalments. The times and the amounts of the several payments are therein set forth, and the mortgagor could not insist upon receiving the money save in accordance therewith. The note called for interest payable monthly, while it was apparent from the

agreement that more than a month might elapse before the mortgagor could rightfully call for any money. In fact no money seems to have been payable to him until November, 1897. It was not the purpose of the instrument to modify the promise contained in the note, but simply to state the consideration for that promise.

By the agreement Fallon had bound himself to lend Kenerson certain sums of money up to the full amount named in the note, with the proviso that he should not in any case be liable to make any payment after the foreclosure of the mortgage. It does not appear, upon the facts found by the master, that Fallon was released from his promise before that time, although it is found that at some time subsequent to April 27, 1898, he entered upon the premises for the purpose of foreclosing the mortgage. If the full amount named in the agreement had been advanced in accordance with its terms, then the full consideration for the note would have been paid, and the mortgagor would have been indebted the full amount. It is not suggested that Fallon was not at all times ready to comply with the terms of his agreement. It was clearly the understanding of the parties that the interest was to be payable monthly on the whole sum named in the note, for four such payments are indorsed upon the note. We think that the legal effect of the contract was that Fallon should have interest upon the full amount, of the principal of the note, so long as he was under an obligation to furnish the money, whether formally set apart or not. *Lewin v. Folsom*, 171 Mass. 188. Upon the facts found by the master that obligation seems to have ceased with the foreclosure on August 24, 1898, and it does not appear to have ceased before.

But it is insisted by the plaintiffs that, inasmuch as the mortgage, neither in itself nor by reference to any recorded instrument, shows what the rate of interest is, it should not be allowed as against these plaintiffs at a rate greater than six per cent per annum. It is urged that a mortgage note is a private document, to which the public have no rightful access, and that a mortgage deed which states the rate of interest on the debt only by reference to a private, unrecorded document, does not in that respect comply with the registration laws, since the amount of the encumbrance cannot be ascertained from the

record; and that where no rate of interest is mentioned, the rate must be six per cent per annum. Pub. Sts. c. 77, § 3.

The condition of the mortgage is that there shall be paid a certain sum with interest "as expressed in the note hereby secured." The mortgage deed gives notice that some interest is to be paid, and that the rate and the times of payment are set out in the note; and this was sufficient to put the plaintiffs upon inquiry; *Richards v. Holmes*, 18 How. 143; and, being put upon inquiry, they must be held to know the facts which in the absence of fraud would be disclosed to them upon such inquiry. See *May v. Gates*, 137 Mass. 389. This is not a case where the amount expressly named in the mortgage is less than that named in the note, as in *Frost v. Beekman*, 1 Johns. Ch. 288, and similar cases.

The result is that all of the exceptions of the plaintiffs to the report of the master are overruled.

As to the mortgage deed to Ellen P. Kenerson, it seems upon the findings made by the master to have been fraudulent as against these plaintiffs. The master has made no specific finding that it was delivered to the mortgagee. No note was given with it, and it was intended to secure a prior indebtedness to the mortgagee. It cannot affect the plaintiffs' rights to the surplus.

The master having found that, from the date of the foreclosure sale, Fallon has kept no special deposit of the balance in his hands after satisfying his claims, and there being nothing to show that he has not used it in his business, he should be charged interest upon it from the date of the sale, the time he received it.

The result is that the surplus proceeds of the sale, amounting to the sum of \$390.81, with interest from August 24, 1898, is to be decreed as belonging to the plaintiffs, and is to be apportioned among them according to their respective interests as they may appear.

So ordered.

FRANCIS I. AMORY & others, trustees, vs. ATTORNEY
GENERAL & others.

Norfolk. January 21, 1901. — May 23, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

Devise, Construction, Charitable trust, Administration cy pres, Limitation of power of sale.

A testatrix, having by her will directed that all her real estate, consisting of an estate called Seven Oaks, should be devoted to a certain charitable use, and that the trustees should have no power to sell any part of Seven Oaks, made in a codicil the following provision: "I hereby cancel everything in my said will, which limits the charitable uses to which my real estate and other property in B. shall be put by the beneficiaries therein named and described; and I now direct that said beneficiaries may use such estate and the income of the trust fund, for all and any such purposes as shall be approved and sanctioned by the trustees holding for them," and authorized the trustees to lease or sell any portion of the real estate with the assent of the beneficiaries and to use the proceeds "for improvements or other needs of same charity." *Held*, that the above directions in the codicil did not mean that the fund might be used for any purpose, whether charitable or not, which the trustees might approve, but only that it might be used for such charitable uses as they approved, the words "any such purposes" referring back to the words "charitable uses."

A testatrix left an estate called Seven Oaks to the Sisters of St. Margaret, a Protestant Episcopal charitable and religious society, to be used for the maintenance of a temporary home for poor and invalid women, only so long as these sisters should choose to occupy and use it for these or similar purposes, or on the termination of such use then to any similar religious or charitable association of sisters of the Protestant Episcopal faith in the United States that will use and occupy the estate for the above named charitable purposes, and, if none such be found, then to the Massachusetts General Hospital for the above named or similar charitable purposes. The Sisters of St. Margaret, other associations of sisters and the Massachusetts General Hospital successively declined to accept the estate for the purposes named in the will. Other charitable and religious corporations, not associations of sisters or of the Protestant Episcopal church offered to accept the property and administer the trust under the terms of the will. Seven Oaks was upon the seashore, and the establishment of a seashore home was a prominent feature of the plan of the testatrix. If Seven Oaks could be sold and about a third of the proceeds invested in a house and lot at the seashore, the Sisters of St. Margaret were willing to put one of the sisters in charge of such house and to use the income of the remainder of the proceeds in carrying out the wishes of the testatrix so far as they could with this and such other funds as they could obtain. The Massachusetts General Hospital was willing, in case Seven Oaks was sold, to accept the proceeds for the purpose of applying the income in the maintenance of its Convalescent Home at Waverly, where men as well as women are admitted. Upon a bill filed by the trustees under the will for

instructions, it was *held*, that there was a good gift to charity, that it had not failed, and that a sale was necessary, and the following scheme reported by a master was approved by the court, namely, that Seven Oaks be sold and the trustees invest the proceeds and pay the net income therefrom to the Sisters of St. Margaret to be by them devoted to their general charitable work; *provided*, that the trustees may invest not more than a certain sum named, in the purchase of a house and land on or near the seashore, and hold it for the sisters, whenever the trustees are satisfied, that, with the aid of the income of the remainder of the fund and such other resources as the sisters may have, the sisters are able and willing to establish and maintain there a temporary home for women in accordance with the directions in the will of the testatrix. This scheme was approved by the court on the ground, that, having money to deal with instead of land, the order of preference of beneficiaries established by the will for the land should be followed in dealing with the money.

Seem, that a provision in a will, that the trustees thereunder shall have no power to sell any part of certain land devised for a charitable use, would not be construed as an attempt to limit the power of the court to authorize a sale, even if it is possible to limit it and thus make specific land inalienable forever. *Per HOLMES, C. J.*

BILL FOR INSTRUCTIONS by the trustees under the will of Jeanne Philomene Amory, late of Braintree, filed November 18, 1899.

The instructions prayed for related to the disposition of certain real estate in Braintree called Seven Oaks held by the plaintiffs for the charitable trust set forth in the will.

The case came on to be heard before *Hammond, J.*, who made the following decree: "That the trust upon which the testatrix, Jeanne Philomene Amory, mentioned in the bill of complaint in this case, devised to the plaintiffs as trustees, the real estate called Seven Oaks, therein mentioned, is a valid public charitable trust; and it appearing that it is doubtful whether the objects and purposes which the testatrix intended to carry out can be attained in the mode particularly prescribed by her in her will and codicil, it is ordered that the cause be referred to Charles A. Williams, Esq., of Brookline, in said county, as master, to hear the parties and report whether such objects and purposes can be attained in the mode particularly prescribed by the testatrix; and if said objects cannot be so attained, then to report a scheme for the accomplishment of the general purpose and intent of the testatrix, having such regard to her directions as to the mode of appropriating said trust property as may be convenient with the efficacious promotion of her general design. And this case is retained for further directions."

The heirs at law of the testatrix appealed from this interlocutory decree.

The will contained the following provisions:

"Fifth: I give and devise my estate in Braintree aforesaid, called Seven Oaks, and used and occupied by me as a summer residence, to my husband, William Amory, junior, to have and enjoy for his life.

"Sixth: Upon the death of my husband, the said William Amory, junior, I give and devise the said estate of Seven Oaks to Francis I. Amory, Sigourney Butler and one other to be by them chosen as is hereinafter provided, to them and to their heirs, successors and assigns, in trust, nevertheless, to hold for the following object, to wit: a Temporary Home for poor women and their young children, and for invalid women both young and old; the said Home to be under the superintendence and control of the Sisters of St. Margaret, a Protestant Episcopal charitable and religious society in Boston in said Commonwealth, and to be conducted by them in accordance with the broadest principles of Christian Charity, the poor, the sick and the weary of any christian denomination finding a temporary resting-place there; it being my express desire that no beneficiary or applicant shall be preferred to another because of any particular form of her religious belief, and furthermore, that, although this is to be a home essentially for females, yet young boys shall not be precluded from coming with their mothers.

"Seventh: All the rest and residue of my real property I give and devise to the said Francis I. Amory, Sigourney Butler, and the one other to be by them chosen as is hereinafter provided, and their heirs, successors and assigns, in trust nevertheless, to hold, or in any manner dispose of, for the benefit of the above-mentioned Temporary Home.

"Eighth: In the event of my surviving my husband, I give and bequeath all the rest and residue of my personal property after the payment of the legacies above-mentioned in the first, second and third clauses, to the said Francis I. Amory, Sigourney Butler and the one other to be by them chosen as is hereinafter provided, to them, their successors and assigns, in trust, nevertheless, to hold, or in any manner dispose of, for the benefit of the above-mentioned Temporary Home."

The ninth article contained provisions relating to the trustees and their powers, and provided that they should receive no compensation for their services. It concluded as follows:

"They [the trustees] shall have no power to sell any part of the above-mentioned estate known as Seven Oaks. They shall keep all the buildings thereon in good repair and well insured. They may use for improvements so much of the capital of any Fund for the benefit of said Home that may be in their control, as may be recommended by the Sisters in charge and approved by themselves.

"The said Trustees and their successors shall forever hold and manage the real and personal estate hereinbefore devoted to the purpose, under the direction and charge of the said Sisters of St. Margaret only so long as the said Sisters shall choose to occupy and use the same for these or similar purposes, and, upon the termination of such occupancy and use by the said Sisters of St. Margaret, then under the direction of any similar religious or charitable association of Sisters of the Protestant Episcopal faith existing in the United States either as an American institution or as an American branch of an English institution that they may select, and, if there be no such association or branch that will occupy and use the said estate for the above-named charitable purposes, then all the said real and personal estate shall be conveyed by the said Trustees to the Trustees of the Massachusetts General Hospital, and their successors and assigns, for the benefit of the said Hospital, and by said Hospital to be used for the above-named or similar charitable purposes. All the foregoing provisions for the benefit of the said Home under the charge of the Sisters of St. Margaret shall apply in all respects to any institution or association that may succeed to them under the trust herein constituted."

The eleventh article was as follows: "Subject to the approval of the said Sisters, I wish and suggest that the Home may be called 'Saint Margaret's.' In giving this Home as above and in making provision for its maintenance, I do not desire to limit in any way its usefulness. I wish the Sisters to occupy it as a winter home, school or hospital, or in any way that they can make it useful; but chiefly as a summer home, so as to offer to the mothers and young children of the deserving

poor a few weeks respite from their cares and an opportunity to enjoy the bathing and the fresh air of the country and derive benefit therefrom; to young girls, a temporary home, and, if possible, instruction in their several vocations; to convalescents from the Hospital and elsewhere, rest before resuming their regular occupations; to invalids, care and nursing which in their poor homes they cannot have; to teachers, working-women and nurses for the sick, rest and change from their vocations. To all an opportunity to see and appreciate the self sacrificing lives of the Sisters, so that each may adopt a higher standard of right and duty. It is my fervent hope that many lives may be helped by the instructions of these good women and that the occupants of the Home may learn from them the reason for the faith that is in them."

A codicil to the will contained the following: "I hereby cancel everything in my said Will, which limits the charitable uses to which my Real Estate and other property in Braintree shall be put by the beneficiaries therein named and described; and I now direct that said beneficiaries may use such Estate and the Income of the Trust Fund, for all and any such purposes as shall be approved and sanctioned by the Trustees holding for them. I hereby authorize and direct said Trustees to lease or to sell any portion of said Real Estate at Braintree with the written assent and approval of the beneficiaries, as cannot be used advantageously, and to use the proceeds of said renting or sale for improvements or for other needs of same charity."

The testatrix left no real estate except Seven Oaks, and no personal property above the amount of the cash legacies and charges of administration, and no property passed to the trustees under the seventh and eighth articles of the will.

The husband of the testatrix, who survived her, relinquished his life estate in Seven Oaks.

The Sisters of St. Margaret declined to accept Seven Oaks under the terms of the will, for the reason among others that the sisterhood had no funds with which to maintain the property. The plaintiffs then offered the property successively to other sisterhoods and to the Massachusetts General Hospital, all of whom declined to accept it under the terms of the will.

The following are extracts from the master's report:

"Of the various charitable organizations which are parties, the following named offered evidence before me, namely: The Sisters of St. Margaret, the Massachusetts General Hospital, the Church Home for Orphan and Destitute Children, the Boston Florence Crittenton Home Society, and the Salvation Army. . . . I find, that the sisterhood of St. Margaret is a body of women organized under the ordinary rules of sisterhoods for benevolent purposes, nursing and taking care of the poor. It is a branch of the well known sisterhood at East Grinstead in England. The sisterhood in England is very large and does a great deal of charitable work there and in India. The society was founded in England in 1854. In this country there are about fifty professed sisters and about fifteen novices, and the principal house of the society, which is practically a hospital, is located at 17 Louisburg Square in Boston, is known as St. Margaret's Home, and the Mother Superior, Sister Louisa Mary, the head of the society in this country, resides there. . . .

"The sisters also have another hospital in Boston at No. 2 Louisburg Square, known as St. Margaret's Infirmary, and carry on St. Monica's Home for Colored Children on Joy Street in Boston; . . . and summer homes for children and working women at Lowell Island in Salem Harbor, at Wellesley, Sea View, Humerock, New Ipswich, N. H., Cape May, and Tenallytown, D. C. . . . The three houses in Louisburg Square known as St. Margaret's Home and St. Margaret's Infirmary, and the two houses in Joy Street known as St. Monica's Home, are owned by a corporation known as the Society of St. Margaret's, organized in 1882 under Chapter 115 of the Public Statutes of this Commonwealth. This corporation consists of three men and about twenty members of the sisterhood. The corporation was organized for the purpose of holding any real estate that might be given for the purposes of the sisterhood. It owns but a small amount of personal property. The summer homes above mentioned are not the property of the sisterhood or of the corporation, but are owned by other charitable corporations and are managed by the sisters without any compensation. The only return which the sisters get is their board. . . . This society [the Sisters of St. Margaret] has need of a summer home for working women by the seashore, but has not sufficient funds to enable it to carry on a home at Seven Oaks.

"There was testimony on behalf of the society that if Seven Oaks could be sold, and if a part of the proceeds could be invested in the purchase by the trustees under the will of a cheaper house, and lot of land, somewhere on Cape Cod, and the remainder of the purchase money to be put at interest, and the income be paid to the sisters, they would put one of the sisters in charge, and would carry out the wishes of the testatrix so far as they could with the money thus received and such other funds as they could obtain; that they think that such a home could be procured for not exceeding \$5,000; that they would expect to charge the working women for their board while they were at the home according to their ability to pay, in order to prevent the occupants of the home from feeling that they were objects of charity, and from their past experience in obtaining money from persons interested in their society, the sisters are confident that they would be able to support such a home.

"There was testimony on behalf of the Massachusetts General Hospital, and I find, that it is a corporation existing under the laws of Massachusetts, founded in 1811, and located in Boston; that it is possessed of a very large property, both of real and personal estate, devoted to the purposes of a hospital in a large degree, both for the benefit of those who can pay and for the benefit of those who cannot pay. There is attached to the hospital, and under the charge of its governors, a convalescent home located at Waverly, Mass. The hospital appropriated some years ago about thirty acres of land for the purposes of this convalescent home. Independent of the general fund of the hospital sums have been contributed to the convalescent home from time to time, which now amount to \$145,620.66, the income of which goes for the benefit of the patients or occupants of the home. Under the rules of the trustees regarding the convalescent home in Waverly, it is provided: First, 'the convalescent home in Waverly shall receive patients from the general hospital.' Second, 'patients from other hospitals, hotels and private houses may be received with the consent of the resident physician of the general hospital.' Third, 'the home shall be under the general superintendence of the resident physician of the general hospital, and under the immediate management of a matron who shall be nominated annually by the resident physician and

appointed by the trustees.' There is no discrimination made in the persons received at the home if their physical condition is suitable. It may and does receive men, women and children. Poor women, young children and invalid women are cared for when the occasion arises. It is a temporary home. Upon the receipt from the trustees under the will of Mrs. Amory of information that there was possibly at the disposal of the hospital this estate of Seven Oaks in Braintree, the resident physician visited Seven Oaks, and afterwards went again with some of the trustees, and the conclusion they arrived at was that Seven Oaks was an unfit place, unfit and unhealthy for the objects in any way connected with the convalescent home; that therefore they are unwilling to take the estate of Seven Oaks as it stands. As the property now stands they could not use it, and would not wish to use it. It could only be used advantageously by them in case it could be sold. There is generally a small deficit in the annual expenses of the convalescent home. The expenses exceed the amount applicable from the income and any little receipts they may have from charges to those who are able to pay for the care they receive there, and this deficit is a charge upon and is made up from the general fund of the Massachusetts General Hospital. There is no limitation upon the amount of property which the convalescent home can hold. The hospital is willing, if Seven Oaks can be sold, and converted into money, to take the proceeds and devote the income to the purposes of the convalescent home. It would also be willing to have the trustees under the will hold the proceeds, and pay the income to the hospital to be devoted by the hospital to the purposes of the home.

"There was evidence tending to show, and I find as a fact, that the Salvation Army is a religious and charitable organization, being an American branch of an English organization, and is incorporated under the laws of New York. The army expends in charitable work in Boston annually not less than \$20,000. It has in Boston a home for poor homeless women, one for working women, and one for fallen women. The members of the army, who are of both sexes, profess to be neither Protestant nor Catholic. The army is connected with no particular religious sect, and in its charitable work does not

discriminate in any way between persons of different religious denominations, or inquire as to the religious belief of those whom it assists. . . . The army is authorized to hold real estate. In the homes of the army they have religious services, but no one is required to attend them. There was testimony on behalf of the army tending to show that it stands ready to take Seven Oaks, and to conduct a home there for women and children in accordance with the terms of Mrs. Amory's will; that it is willing to do this under an advisory board of the Protestant Episcopal Church; that no fallen women would be admitted to this home, the home which the society already has for that purpose being sufficient; that no men would be admitted. The men relieved by the army are put on the farm colonies of the army in Ohio, California and Colorado. That the ordinary conduct of such a home by the army would involve the allowing of women and children that might be admitted, to remain there until homes could be found for them elsewhere, and that in the ordinary administration of such a home children would be taken from the slums in the summer season from time to time, to the home grounds, for excursions, but that the army is willing so far to modify its ordinary conduct of such a home as to make the conduct of the home conform to the wishes of the testatrix as expressed in her will, as the same are understood by the army's managers.

"On behalf of the Florence Crittenton Home Society there was testimony tending to show, and I find, that this society is located in Boston, and is an outgrowth or organic part of the general system of Florence Crittenton homes throughout the United States, of which there are in all fifty-two. A Mr. Crittenton, a very wealthy druggist of New York City, is the President of the associated Crittenton homes of the United States. Mr. Crittenton is a member of the Episcopal church in New York, and his business manager is the widow of a deceased rector of the Episcopal church. The Boston home is a Massachusetts organization incorporated in 1896 under the general law. It is a temporary home for women. The other homes are organized as corporations in the respective States in which they are located. Some of them have State aid. All of these homes are temporary homes for destitute and friendless women.

All of these homes, including the Boston home, are supported by voluntary contributions. The Boston home has no permanent fund. The management of all these homes is local, but all of them, including the Boston home, are under the supervision of Mr. Crittenton's business manager. The Boston corporation is made up almost exclusively of ladies, they having the direct management of the home and being responsible for the finances. The matron and president of the home are both women. The home is connected with no particular religious sect, but in the board of women managers practically all the churches in Boston are represented except the Catholic church, the home being a Protestant organization. The Boston home is now located at 54 Munroe Street, in Roxbury. No distinction is ever made as to the religious belief of those who are given the benefits of the home. The ladies who manage the home are connected with it only so long as they see fit to be, being at liberty to retire at any time. At the Boston home there is a very efficient laundry which is operated by the inmates, and this laundry has paid nearly all the house expenses. . . . There was evidence on behalf of this home that the corporation would like to take the estate of Seven Oaks, and remove its present home to this spot, and would in this case conduct the home substantially on the lines of its present work, receiving poor and sick women and girls and small children with their mothers, and caring for them until they were able to care for themselves or get work elsewhere. It is the opinion of the managers of the society that the laundry could be as successfully conducted at the Seven Oaks estate as in Boston. It is the intention of this home, if it can obtain the Seven Oaks estate, to sell its present Boston home and to remove to Seven Oaks.

"On the part of the Church Home for Orphan and Destitute Children there was testimony tending to show, and I find, that this home was organized in 1855, and incorporated in Massachusetts under a special charter in 1858. The object for which the charity was organized was to provide a home and education for orphan and destitute children under the direction of the Protestant Episcopal Church. . . . The society is of the opinion that the estate of Seven Oaks is a suitable place for carrying on the

work for the purposes for which the society was started, and is willing to take this place if it shall be given to them by decree of the Court, and to run it according to the purposes named in the charter of the corporation, and the corporation has so voted. If the society were to take Seven Oaks, they would expect to sell certainly one of their present homes, and probably both. The probabilities are that they would sell both and remove to Seven Oaks. If this society were to take Seven Oaks they would necessarily be limited to the use of it for the purposes mentioned in their charter, which would preclude the admission of women.

“At the hearing before me, the counsel for the husband and heirs at law of the testatrix stated that in addition to the other questions saved by them in this cause, they wished to have a definite ruling made by me ‘as to the power of the master to find for such husband and heirs at law under the terms of the decree by which the case was referred to the master.’ I accordingly ruled, as matter of law, and without regard to the facts found by me or otherwise appearing in the hearing before me, that by the terms of the decree, I was not at liberty to make any finding in favor of the husband or heirs at law of the testatrix.

“I find that the testatrix left no real estate except said estate known as Seven Oaks, and no residuum of personal property remaining after the payment of the money legacies and charges of administration, so that no property of any kind, either real or personal, has ever been received by the trustees under the will of the testatrix to hold as a fund as contemplated in the seventh and eighth clauses of her said will.

“I visited the estate known as Seven Oaks, and made an examination of the property. The estate is situated in Braintree, and contains between twenty and twenty-five acres of land. It is valued by the assessors of Braintree for the purposes of taxation at \$15,800. There is a dwelling house on the land, formerly occupied by the testatrix and her husband as a summer residence, containing some fifteen or sixteen rooms. This house is in good condition, but was built for a summer house, and does not appear to have adequate heating arrangements for a winter residence. There are two other small houses on the estate, one of which was built by Mrs. Amory for the accommodation of poor children whom she had there as guests for

their recreation in the summer season. The other buildings are a cow stable, horse stable, carriage house, sheds, and a hay barn. These buildings are in a fair state of repair. The land has been carefully worked over and is laid down in grass, and there are a great many shade trees upon the estate, and a good deal of money has evidently been expended upon the estate to fit it for a residence of a person of means. The buildings are all of wood, and the expense of keeping them in repair and of keeping up the grounds would be considerable.

"I have carefully considered the provisions of the will and codicil of the testatrix, and all the evidence presented to me, and the arguments of the counsel representing the different parties, and I find and report to the Court that the objects and purposes which the testatrix intended to carry out cannot be attained in the mode particularly prescribed by the testatrix in her will and codicil, for the reason that the Sisters of St. Margaret have declined to take the estate of Seven Oaks as it stands to-day; no similar organization has been found that will take it; the Massachusetts General Hospital has declined to take it upon the trusts declared in the will; and I find it to be impracticable to divide the estate, and by renting or selling a part of it, to realize sufficient money to enable the sisters to conduct a home on the remaining land, even if they were willing to do so. To undertake thus to divide the land, and to rent or sell a part of it, in the hope of obtaining funds sufficient for the carrying on of such a home as the testatrix contemplated, on a part of the estate to be reserved for the purpose, would be a course too speculative to be countenanced, and was not suggested by any of the parties, and would not have been alluded to by me but for the suggestion in the codicil to the will.

"I may add that none of the charitable organizations which have appeared in this cause, and signified their willingness to take the estate as it now stands, appear to me to come within the class designated by the testatrix in the ninth clause of her will, to take by way of substitution in case of the failure of the Sisters of St. Margaret to take the estate or to carry on a home there, and therefore the willingness of these organizations to take the estate as it stands cannot affect my finding on this first question submitted by the decree.

“ Upon the second question submitted by the decree of the Court, without going into the facts and arguments advanced by the several parties, all of which I have carefully considered, I report that upon reading the will and codicil, it seems clear that the primary object of the testatrix was to aid not necessarily absolutely destitute, but poor and invalid, working women and girls, a class not very easily reached by our ordinary public charitable organizations; and to do this through the instrumentality of the Sisters of St. Margaret (with whose aims and methods of working the testatrix must be presumed to have been familiar), or by the aid of some similar organization of the Protestant Episcopal Church; and that the moral and religious influence which the sisters were expected to exert by their example over the persons coming under their care, formed an essential part of the scheme of the testatrix.

“ Undoubtedly the testatrix believed the best way to accomplish this general purpose to be the method pointed out by her, of converting the estate of Seven Oaks into a temporary resting place or home, to be under the charge of the sisters, and which they themselves to some extent could occupy.

“ But circumstances having arisen which make it impossible to carry out the plan of the testatrix in its entirety, it appears to me that it would be a greater departure from the general purpose and object of the testatrix to turn over the estate to any of the charitable organizations which are parties to this suit, to be used for the relief of persons not very closely resembling the class intended by the testatrix, or to be administered by a very different class of persons, or by persons who, however much they may resemble the Sisters of St. Margaret in their methods of working, are nevertheless of a different religious sect, than would be the case if the property were to be sold, and the proceeds devoted to the general charitable purposes of the Sisters of St. Margaret. As the property must be sold and converted into money before the Massachusetts General Hospital is willing to avail itself of the gift, and the hospital would then apply the income to the general purposes of its home at Waverly, which admits persons of both sexes, and is not under the management of the sisters or any kindred society, it seems to me that the general purposes of the testatrix will not be so well met by giving the income of

the fund to be obtained from the sale of the estate to that institution as would be the case if it were to be given to the Sisters of St. Margaret for their general charitable work. At the same time, I think that the establishment of a seashore home was a prominent feature in the mind of the testatrix, and that such a home should be established if it be found to be practicable.

"I accordingly report for the consideration of the Court, the following scheme for the administration of the charity created by the testatrix, as the one which seems to me to be most in accord with the general purpose and intent of the testatrix, and as nearly consistent with her directions as to the mode of accomplishing such general purpose and intent as is possible in the circumstances which have arisen, and which make some departure from the strict letter of her directions absolutely necessary.

"Scheme: That the trustees under the will be directed to sell the estate known as Seven Oaks at public or private sale, for such price and upon such terms of payment as they in the exercise of their discretion may deem best, and to convey the same to the purchaser in fee simple, free and clear of all trusts, and without any obligation on the part of the purchaser to see to the application of the purchase money. That the proceeds of such sale, less the cost of making the same, and after deducting therefrom the expenses hitherto and up to the time of such sale incurred or to be incurred by the trustees in caring for and maintaining said property, including the taxes thereon paid by them, together with a reasonable allowance as compensation to said trustees for their trouble in effecting said sale (if the Court shall see fit to make such allowance in view of the fact that circumstances not contemplated by the testatrix have made a sale of the property necessary, thus entailing trouble and work for the trustees not contemplated by the testatrix), and after deducting therefrom the costs and disbursements of the plaintiffs incurred by them in prosecuting this suit to be taxed as between solicitor and client, and all such costs and disbursements of the other parties to this suit, if any, as the Court may see fit to make a charge upon the fund, be invested and held by said trustees under said will, and their successors, with authority to vary investments from time to time at their discretion, upon the trust to pay over the net annual income

of the fund thus obtained as often as may be convenient to the society known as the Sisters of St. Margaret, to be by the said sisters devoted to the general charitable work of the said sisters; *provided, however*, that the trustees for the time being administering the trusts declared by the testatrix may invest not more than \$6,000 of the proceeds of said sale in the purchase of a house and land on or near the seashore, in this Commonwealth, and hold the same for said sisters, whenever the said trustees are satisfied that with the aid of the income of the remainder of the fund in the hands of the trustees, and such other resources as the sisters may have, said sisters are financially able and willing permanently to establish, maintain and conduct upon the estate so to be purchased, a temporary home for women and girls, in accordance with the directions contained in the will of the testatrix; and in the event of the establishment of such a home, the income of so much of the fund in the hands of the trustees as shall remain after the purchase of said home, shall no longer be applied by the said sisters to their general charitable work, but shall all be applied by said sisters to the uses and purposes of said home."

Exceptions to the master's report were filed by the heirs at law of the testatrix, and by the Florence Crittenton Home, the Church Home for Orphan and Destitute Children and the Woman's Home Missionary Society of the Methodist Episcopal Church.

At the request of the parties, the case was reserved by *Morton, J.*, for the consideration of the full court, upon the pleadings, the interlocutory decree and the appeal therefrom, and upon the master's report and the exceptions thereto, so far as they raised questions of law, the exceptions being overruled so far as they raised questions of fact; such decree or other disposition of the case to be made as to the full court should seem meet.

F. R. Bangs, for the heirs at law of the testatrix.

J. A. Lowell, for the Sisters of St. Margaret.

S. Lincoln, for the Massachusetts General Hospital, did not care to be heard, and filed a statement to that effect.

A. R. Weed, for the Woman's Home Missionary Society of the Methodist Episcopal Church.

E. B. Gibbs, for the Florence Crittenton Home.

F. Cunningham, for the Church Home for Orphan and Destitute Children, submitted the case on a brief.

F. T. Hammond, Assistant Attorney General, for the Commonwealth.

I. C. Hersey, for the trustees, the plaintiffs.

HOLMES, C. J. The first question raised in this case is whether the trust created by the will and codicil is a good charitable trust and has not failed. It is not disputed that the object declared in the will is a good charity. Plainly it is. Then the codicil cancels everything in the will "which limits the charitable uses to which my Real Estate and other property in Braintree shall be put by the beneficiaries," and now directs "that said beneficiaries may use such Estate and the Income of the Trust Fund, for all and any such purposes as shall be approved and sanctioned by the Trustees holding for them." These words do not mean that the fund may be used for any purpose, whether charitable or not, which the trustees may approve, but only that it may be used for such charitable uses as they approve. The word "such" refers to "the charitable uses," as further appears from the authority to sell and to use the proceeds for "needs of same charity." The contrary is not argued for the heirs.

It is argued, however, that the charity has failed. The ground is that the governing intention is the actual occupation of Seven Oaks, the specific estate devised, as a temporary home, and, subject to that, that it should be occupied by the Sisters of St. Margaret or some other Protestant Episcopal sisterhood. There is no doubt that the scheme in the will which has proved impracticable was only second in the mind of the testatrix to her general charitable intent. But if not accepted by a sisterhood, the whole property is to be conveyed by the trustees of the will to the Trustees of the Massachusetts General Hospital, "to be used for the above-named or similar charitable purposes"; and this clearly shows that the general charitable intent was not to fail with the failure of the testatrix's scheme so far as the occupation by a sisterhood is concerned. The words already quoted from the codicil tend to the same conclusion with regard to occupation of the estate, and the perusal of both documents makes it plain that, as might be expected, the creation of a charitable fund is the leading purpose expressed, and is not

subordinate to or conditional upon the keeping up of the estate to which the testatrix seems so attached. *Weeks v. Hobson*, 150 Mass. 377, 380. *Sherman v. Congregational Home Missionary Society*, 176 Mass. 349, 352. It follows that the heirs can base no claim upon the master's finding that the purposes of the testatrix cannot be attained in the mode particularly described in the will and codicil, but that those purposes must be carried out, as nearly as may be, by a scheme framed under the sanction of the court.

With some hesitation we are of opinion that the scheme reported by the master should be adopted by the court. It is true that institutions can be found willing to carry out the trust, but they are not within the class mentioned by the testatrix, and the will shows the importance attached to management by a sisterhood, not only by the eleventh paragraph but by the gift to the Massachusetts General Hospital if no Protestant Episcopal sisterhood would occupy and use the land. The doubt raised by the physician and trustees of the Hospital as to the salubrity of the spot furnishes a reason for not regretting the failure of this part of the testatrix's intent.

If the land cannot be occupied as intended by the testatrix, it is proper that it should be sold. The provision in the will that the trustees shall have no power to sell any part of Seven Oaks hardly would be construed as an attempt to limit the power of the court to authorize a sale, assuming that it is possible to limit it and thus to make specific land inalienable forever. See *Stanley v. Colt*, 5 Wall. 119; *Mercer Home, Fisher's Appeal*, 162 Penn. St. 232, 239; *St. Mary Magdalen v. Attorney General*, 6 H. L. Cas. 189, 205; *Attorney General v. Newark-upon-Trent*, 1 Hare, 895; *In re Clergy Orphan Corporation*, [1894] 3 Ch. 145, 154; Sugden, Law of Property as administered by the House of Lords, 535. But however this may be, the codicil authorizes and directs the trustees to sell any portion of the real estate which cannot be used advantageously; and taking this with the will we are of opinion that a sale may be made.

If a sale is to be made and the use of the place given up, a question might be raised whether the Massachusetts General Hospital is not entitled under the will. The Hospital declined the offer of the trustees, evidently on the assumption that ac-

ceptance would mean an undertaking to use the place ; but it would be willing to accept money and to apply the income to its convalescent home for both sexes. We are of opinion that the construction of the will implied in its declining the offer was correct. That is to say, we are of opinion that the gift to the Hospital, although made only in the event of the failure of the desired plan, still adhered to the intent that the specific land should be kept and used. It was not an out and out gift of the property, with no other restriction than that it should be used for charity. Therefore when the occupation of the place, even by the Hospital, fails, the disposition of the proceeds is left untouched by the will except so far as the instrument affords indications of what the testatrix would have been likely to prefer in a case for which she did not provide.

Having money instead of land to deal with, we start again on a new plane, and there seems no sufficient reason why for this new fund we should not follow the order established in the will for the old. It is true that an unscrupulous beneficiary might reject the management of an estate which it was in its power to accept, because it saw a chance to get free money in place of it. But no absolute rule can be founded upon the mere possibility of fraud. The findings of the master establish that this is an honest case. By giving the expenditure of the income to the Sisters of St. Margaret, we give it into the hands which the testatrix preferred, and the scheme contemplates such a home as she wished, although in a different place, whenever the whole fund is sufficient to warrant it.

Decree accordingly.

GEORGE H. LAW vs. JOHN J. O'REGAN & another.

Middlesex. March 6, 1901. — May 23, 1901.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

Judgment, Effect of.

In an action on a bond given under St. 1895, c. 234, § 4, upon a petition to vacate a judgment, the judgment against the principal in the absence of fraud or collusion is conclusive evidence of the amount of the judgment debt against both principal and surety.

HAMMOND, J. This is an action upon a joint bond, given in a petition brought under St. 1895, c. 234, to vacate a judgment. One of the conditions was that the defendant O'Regan should satisfy the judgment, if not vacated upon the petition. The judgment was not vacated, nor has it been in any part satisfied.

In the hearing as to the amount for which execution should issue, the defendants desired to go into the question whether there ought to have been a judgment for the plaintiff in the original action, and, if so, for how much. No contention was made that there was collusion in obtaining the judgment. As to fraud, the defendants asked the court to rule that "It would be a fraud on the surety, the defendant Farrell, for the plaintiff on the default in the [original] action against O'Regan, knowingly to cause an excessive value to be testified to on the property at the assessment of damages, and if he is entitled to execution for more than a nominal sum it could not be for more than the fair value of the property at the time of the conversion, if any."

The court found that the value of the property was not shown to be excessive, and declined to rule as requested.

No fraud or collusion being shown, the judgment against the principal was conclusive evidence of the amount of the debt thereby ascertained, both against him and the surety in this action upon the bond. *Way v. Lewis*, 115 Mass. 26, and cases therein cited.

Exceptions overruled.

A. A. Wyman, (J. E. Kelley with him,) for the defendant Farrell.

E. W. Philbrick, for the plaintiff.



JAMES A. MUNKLEY vs. GEORGE M. HOYT & others.

Suffolk. March 7, 1901. — May 23, 1901.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

Registered Pharmacist, What is a conviction.

St. 1896, c. 397, § 9, provides that the license of a registered pharmacist shall not be revoked for a cause punishable by law until after conviction by a court of competent jurisdiction. A registered pharmacist pleaded guilty to a complaint in the Superior Court charging him with an unlawful sale of intoxicating liquor, and thereupon that court ordered the complaint placed on file, and there was no other order or proceeding in the case. *Held*, that this was a conviction within the meaning of the above clause and that the license of the pharmacist could be revoked on a charge of keeping intoxicating liquors for the purpose of unlawful sale.

PETITION for a writ of certiorari to correct the proceedings of the board of registration in pharmacy in revoking the petitioner's certificate of registration as a registered pharmacist on a charge of keeping intoxicating liquors for the purpose of unlawful sale, filed January 8, 1901.

The case was heard by *Hammond, J.*, who reported it for the consideration of the full court as follows:

"At the hearing before me the only questions in dispute were whether the petitioner had been guilty of laches, and whether he had been convicted of an offence punishable by law within the meaning of St. 1896, c. 397, § 9. Upon the first question I found in favor of the petitioner.

"As to the question respecting conviction, it appeared that, to a complaint for the illegal sale of intoxicating liquor pending in the Superior Court for this county against the petitioner, he, on the 14th day of October A. D. 1897, pleaded guilty; and thereupon, on motion of the petitioner, the court ordered the complaint to be placed on file, and there has since been no other order or proceeding in the case.

"I report to the full court the question whether, upon these facts, the petitioner has been convicted within the meaning of the statute. If he has been so convicted, then the petition is to be dismissed; otherwise the writ is to issue."

☛

St. 1896, c. 397, § 9, provides that the board of registration in pharmacy may, after hearing, suspend the registration of a registered pharmacist "and his certificate thereof, for such term as the board in their judgment, after due consideration of the facts, may deem for the best interest of the public, or may revoke it altogether, but the license or certificate of registration of a registered pharmacist shall not be suspended or revoked for a cause punishable by law until after conviction by a court of competent jurisdiction."

J. F. Lynch, for the petitioner.

F. H. Nash, Assistant Attorney General, for the respondents.

HAMMOND, J. The petitioner pleaded guilty to a complaint pending in the Superior Court charging him with an unlawful sale of intoxicating liquor; whereupon on his motion the court ordered the complaint placed on file, and there has since been no other order or proceeding in the case.

The question is whether upon these facts the petitioner has been convicted within the meaning of St. 1896, c. 397, § 9.

The word "conviction" is used in at least two different senses in our statutes. In *Commonwealth v. Lockwood*, 109 Mass. 323, 325, Gray, J., uses this language: "The ordinary legal meaning of 'conviction,' when used to designate a particular stage of a criminal prosecution triable by a jury, is the confession of the accused in open court, or the verdict returned against him by the jury, which ascertains and publishes the fact of his guilt; while 'judgment' or 'sentence' is the appropriate word to denote the action of the court before which the trial is had, declaring the consequences to the convict of the fact thus ascertained"; and he cites authorities which amply sustain the proposition. This, then, is the usual and altogether the most common meaning of the word "conviction."

When, however, it "is used to describe the effect of the guilt of the accused as judicially proved in one case, when pleaded or given in evidence in another, it is sometimes used in a more comprehensive sense, including the judgment of the court upon the verdict or confession of guilt." *Commonwealth v. Lockwood*, *ubi supra*, 329. There are two cases in our reports where the word is used in this latter and less usual sense. The first is *Commonwealth v. Gorham*, 99 Mass. 420, in which it was held that the

word, as used in the statute providing that the conviction of a witness of a crime may be shown to affect his credibility, implies a judgment of the court, the ground of the decision being that at common law the production of the full record, including not only the conviction, technically so called, but the judgment thereon, was necessary to show that a witness was incompetent on account of infamy, and that the intention of the statute was to restore the competency of the witness against whom the record of a crime is produced, but to permit the same evidence to be used as affecting his credibility. The second is *Commonwealth v. Kiley*, 150 Mass. 325, in which the word "conviction" in St. 1887, c. 392, providing that the conviction of a licensee for violation of certain provisions of the law relating to intoxicating liquors shall "of itself" make his license void, was held to have a like meaning. In this case the court said that the effect of a conviction is to deprive the defendant of a valuable right without an opportunity of further trial or investigation, and that by subsequent proceedings in the same court it might finally turn out that the defendant was not guilty.

St. 1896, c. 397, establishes a board of registration in pharmacy, consisting of five persons whose duty it is (§ 5) to examine applicants for registration as pharmacists, and to issue certificates to those who are found qualified. The seventh section provides that the board shall hear all complaints made to them against any registered pharmacist, charging him with certain kinds of misconduct in the business of pharmacy which are in the statute set forth, and especially with a violation of the laws relating to the sale of intoxicating liquor. The eighth section provides that the board "shall notify the person complained against of the charge," and of the time and place of hearing, that the accused may then and there appear with witnesses and be heard by counsel, that three members of the board shall constitute a quorum for the hearing, that "either member" may administer the oath to the witnesses, and that "any person so sworn who wilfully swears or affirms falsely respecting any matter upon which his testimony is required shall be deemed guilty of perjury." The board is also authorized to send for persons and to compel the attendance of witnesses by process duly served. The ninth section provides that if the board find the accused

guilty of the acts charged against him they may suspend or revoke his registration and his certificate, "but the license or certificate of registration of a registered pharmacist shall not be suspended or revoked for a cause punishable by law until after conviction by a court of competent jurisdiction."

From this examination of the material sections of the statute, it appears, that provision is made for a full and fair trial of the complaint; and the plain purpose of the statute is that the hearing before the board shall be independent of any proceeding before any other court or tribunal, and that the decision of the board shall be upon the evidence produced there and not elsewhere. The record of the conviction of the accused by a verdict of a jury is not admissible at the hearing as evidence of his guilt. It is true that proof of his confession in open court of his guilt would be admissible against him at the hearing just as any other admission of guilt made by him would be, wherever made, but not upon the ground that such confession is conviction but that it is an admission. In no way is the judgment of the board upon the question of the guilt of the accused to be affected by the proceedings in another court.

If the board find the accused guilty, the only penalty they can impose is the suspension or revocation of the license or certificate. If the offence is a crime, they must see whether he has been convicted by a court of competent jurisdiction. We are of the opinion that at this stage of the case the accused stands before the board of pharmacy exactly as before the court where his guilt has been established by his plea or by a verdict of a jury. If in that court his case is ripe for sentence, it must be considered as ripe for sentence before the board. It is the intention of the statute to give a pharmacist charged with a crime the right to a trial in the court having jurisdiction of his offence, but if his guilt be there established so that the court may impose sentence according to its powers, then it is sufficiently established for the board of pharmacy to act upon their finding, and to impose the penalty according to their powers. The question whether the convicted pharmacist shall suffer the penalty which it is within the province of the trial court to impose is an entirely different question from that before the board of pharmacy.

It is not difficult to conceive of a case where, so far as respects

the penalty which the court may impose, it would be wise to place the case on file and not to pass any sentence at all, and yet that it would be very unwise and entirely inconsistent with the public interests that the convicted person should be allowed to hold himself out as a registered pharmacist and to perform the important functions of such a position. The problems before the respective tribunals are entirely different, and, the guilt of the accused being established through conviction by plea or verdict in the one and by the finding after a hearing in the other, the accused is subject to such punishment as the respective tribunals may lawfully impose, and the right of either to proceed to judgment is not affected by the fact that the other sees fit to decline to proceed to judgment.

Such an interpretation of the statute gives to the word "conviction" its ordinary legal meaning, preserves to the pharmacist the benefit of a trial before a jury in cases where his offence is criminal, provides for an independent hearing before each tribunal and independent action on the part of each, and leaves to each the power to take appropriate action as to that part of the public and private interests specially committed to its care.

Petition dismissed.

MARGARET BARRY vs. BENJAMIN LANCY.

Suffolk. March 8, 1901. — May 23, 1901.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

Tax, Sale, Right of mortgagee to redeem. Constitutional Law, Class legislation.

The right of a purchaser at a foreclosure sale and of his assignee to redeem from a tax sale is settled; and this right exists although the mortgage was given after the lien for taxes had attached and the foreclosure was before the tax sale.

The clause of St. 1888, c. 390, § 57, giving mortgagees of record the right to redeem from a tax sale within two years after actual notice of the sale, is not unconstitutional as class legislation.

Where the holder of a tax title has evaded one holding under a mortgagee and thus prevented a redemption, a bill in equity to redeem the land may be brought under St. 1888, c. 390, § 76, at any time within five years from the tax sale. The remedy, by paying the city treasurer, given by §§ 58, 59 of the same chapter, is cumulative and does not exclude the right to equitable relief. Following *Clark v. Lancy*, 178 Mass. 460, on both points.

HOLMES, C. J. This is a bill to redeem from a tax sale. The premises were mortgaged to the plaintiff on November 12, 1895. On September 4, 1896, they were sold on a foreclosure sale, and on December 4, 1896, the purchasers conveyed their title to the plaintiff, on the ground, it is suggested, that they thought that the foreclosure sale was bad for want of a previous entry. One day before this conveyance, that is, on December 3, the premises were sold to the defendant for taxes. The plaintiff had a decree, and the case is here by the defendant's appeal on the evidence. We shall mention briefly the chief points argued.

Assuming the foreclosure of the mortgage to have been valid, the right of a purchaser at a foreclosure sale and of his assignee to redeem is settled. *McGauley v. Sullivan*, 174 Mass. 303. *Lancy v. Abington Savings Bank*, 177 Mass. 431, 433. *Downey v. Lancy*, 178 Mass. 465. In the second case, as in this, the mortgage was given after the lien for taxes had attached. In this there is the further fact that the foreclosure was before the tax sale. But in our opinion the intention of the statute to protect *bona fide* mortgagees, who but for it might lose their security before they ever heard that the taxes were unpaid, extends as well to such intervening securities and to those who claim title under them as to mortgages outstanding at the time of the sale. See *Clark v. Lancy*, 178 Mass. 460.

It is rather late to attack the constitutionality of the statute. The objection urged is that the right given to mortgagees to redeem is confined to mortgagees of record. St. 1888, c. 390, § 57. In view of the general policy of our law to require registration of titles, and the special reasons for requiring this evidence of good faith as a condition for extending the ordinary time of redemption, we think no further argument necessary to sustain the act.

It is objected that the bill does not appear to have been brought within two years after the plaintiff had actual notice of the sale. We shall not consider which side has the burden of proof, or whether the plaintiff has to go forward with evidence, or whether there was not sufficient evidence in the absence of anything calling special attention to the matter. If all those questions should be decided against the plaintiff, as we

are far from intimating that they should be, the bill would be maintainable under St. 1888, c. 390, § 76. It was brought within five years, and the defendant evidently endeavored to evade the plaintiff and to prevent a redemption. *Clark v. Lancy*, 178 Mass. 460.

The right given to the plaintiff by §§ 58, 59, to pay the city treasurer, was a cumulative remedy and did not cut down her right to equitable relief. *Clark v. Lancy*, 178 Mass. 460.

Decree affirmed.

W. O. Childs, for the defendant.

H. J. Jaquith, for the plaintiff.

AUGUSTUS B. MARTIN & others vs. WILLIAM MELES
& others.

Suffolk. March 20, 1901. — May 23, 1901.

Present: HOLMES, C. J., MORTON, LATHROP, & BARKER, JJ.

Contract, Consideration, Damages after notice by defendant of intended breach, Parties.

The defendants, being leather manufacturers, signed the following agreement which also was signed by nine other leather manufacturers: "We, the undersigned, manufacturers of leather, promise to contribute the sum of \$500 each, and such additional sums as a committee appointed by the Massachusetts Morocco Manufacturers Association may require; in no case shall the committee demand from any manufacturer or firm a total of subscriptions to exceed the sum of \$2,000, such sum to be employed for legal and other expenses under the direction of the committee in defending and protecting our interests against any demands or suits growing out of Letters Patent for Chrome Tanning, and in case of suit against any of us the committee shall take charge thereof and apply as much of the fund as may be needed to the expense of the same." The plaintiffs were the committee referred to in the agreement and subscribers to it. They did some work before the agreement and after its execution did more, undertook the defence of suits and levied assessments, which were paid, the defendants paying \$750. Thereafter the defendants' firm was dissolved and went out of business, and the defendants notified the plaintiffs thereof. Later upon a demand for the rest of their subscription the defendants refused to pay it. *Held*, that the committee by signing the agreement promised not only to accept the subscribers' money but to perform the duties named, and that either this promise or the subsequent work of the committee invited by the agreement was a good consideration for the defendants' subscription, the court inclining to the view, that the plaintiffs' promise alone was the consideration, but declaring that, if the acts and

not the promise constituted the consideration, the defendants' promise became binding upon the first substantial act done by the committee, and, that the defendants' promise was entire and not a series of promises to pay successive sums upon successive steps by the committee. *Held, also*, on the question of damages, that the defendants did not notify the plaintiffs to stop performance until the defendants' liability had been fixed by a demand under the contract, and, even if such a notice had been given in advance, the plaintiffs would have had the right to go on with this contract where there was a common interest in the performance and where the part done and that which remained to be done appeared to be largely interdependent.

Seemle, that, where a defendant has announced his intention of breaking a contract and ordered the plaintiff to stop work under it, in cases where the continuance of the work would be merely a useless enhancement of damages, the plaintiff cannot recover damages occasioned by his continuing work after the order to stop.

Comment by HOLMES, C. J., on the fact that the repudiation of the notion, that the subscription of others than the plaintiff might be a consideration for the subscription of the defendant, seems not to have been extended to agreements of creditors to accept a composition.

A binding subscription to pay such sums as a committee appointed by a certain association may require is a contract made with such a committee subsequently appointed.

HOLMES, C. J. This is an action to recover the contribution promised by the following paper, which was signed by the defendants and others: "January 21, 1896, We, the undersigned, manufacturers of leather, promise to contribute the sum of five hundred (500) dollars each, and such additional sums as a committee appointed by the Massachusetts Morocco Manufacturers Association may require; in no case shall the committee demand from any manufacturer or firm a total of subscriptions to exceed the sum of two thousand (2,000) dollars, such sum to be employed for legal and other expenses under the direction of the committee, in defending and protecting our interests against any demands or suits growing out of Letters Patent for Chrome Tanning, and in case of suit against any of us the committee shall take charge thereof and apply as much of the fund as may be needed to the expense of the same."

The plaintiffs are the committee referred to in the agreement, and subscribers to it. They were appointed and did some work before the date of the agreement, and then prepared the agreement which was signed by nine members of the association mentioned, and by the defendants, who were not members. They went on with their work, undertook the defence of suits, and levied assessments which were paid, the defendants having

paid \$750. In November, 1896, the defendants' firm was dissolved, and two members of it, Meles and Auerbach, ceased tanning leather. The defendants notified the plaintiffs of the dissolution, and on June 23, 1897, upon demand for the rest of their subscription refused to pay the same. The main questions insisted upon, raised by demurrer and by various exceptions, are whether the defendants' promise is to be regarded as entire and as supported by a sufficient consideration.

It will be observed that this is not a subscription to a charity. It is a business agreement for purposes in which the parties had a common interest, and in which the defendants still had an interest after going out of business, as they still were liable to be sued. It contemplates the undertaking of active and more or less arduous duties by the committee, and the making of expenditures and incurring of liabilities on the faith of it. The committee by signing the agreement promised by implication not only to accept the subscribers' money but to perform those duties. It is a mistaken construction to say that their promise, or indeed their obligation, arose only as the promise of the subscribers was performed by payments of money.

If then the committee's promise should be regarded as the consideration, as in *Ladies' Collegiate Institute v. French*, 16 Gray, 196, 201, see *Maine Central Institute v. Haskell*, 75 Maine, 140, 144, its sufficiency hardly would be open to the objection which has been urged against the doctrine of that case, that the promise of trustees to apply the funds received for a mere benevolence to the purposes of the trust imposes no new burden upon them. *Johnson v. Otterbein University*, 41 Ohio St. 527, 531. See *Presbyterian Church of Albany v. Cooper*, 112 N. Y. 517. Neither would it raise the question whether the promise to receive a gift was a consideration for a promise to make one. The most serious doubt is whether the promise of the committee purports to be the consideration for the subscriptions by a true interpretation of the contract.

In the later Massachusetts cases more weight has been laid on the incurring of other liabilities and making expenditures on the faith of the defendant's promise than on the counter-promise of the plaintiff. *Cottage Street Church v. Kendall*, 121 Mass. 528. *Sherwin v. Fletcher*, 168 Mass. 413. Of course the mere

fact that a promisee relies upon a promise made without other consideration does not impart validity to what before was void. *Bragg v. Danielson*, 141 Mass. 195, 196. There must be some ground for saying that the acts done in reliance upon the promise were contemplated by the form of the transaction either impliedly or in terms as the conventional inducement, motive and equivalent for the promise. But courts have gone very great lengths in discovering the implication of such an equivalence, sometimes perhaps even having found it in matters which would seem to be no more than conditions or natural consequences of the promise. There is the strongest reason for interpreting a business agreement in the sense which will give it a legal support, and such agreements have been so interpreted. *Sherwin v. Fletcher, ubi supra*.

What we have said justifies, in our opinion, the finding of a consideration either in the promise or in the subsequent acts of the committee, and it may be questioned whether a nicer interpretation of the contract for the purpose of deciding which of the two was the true one is necessary. It is true that it is urged that the acts of the committee would have been done whether the defendants had promised or not, and therefore lose their competence as consideration because they cannot be said to have been done in reliance upon the promise. But that is a speculation upon which courts do not enter. When an act has been done, to the knowledge of another party, which purports expressly to invite certain conduct on his part, and that conduct on his part follows, it is only under exceptional and peculiar circumstances that it will be inquired how far the act in truth was the motive for the conduct, whether in case of consideration, *Williams v. Carwardine*, 4 B. & Ad. 621, see *Maine Central Institute v. Haskell*, 75 Maine, 140, 145, or of fraud. *Windram v. French*, 151 Mass. 547, 553. In *Cottage Street Church v. Kendall*, 121 Mass. 528, the form of the finding in terms excluded subsequent acts as consideration, and therefore it did not appear whether the facts were such that reliance upon the promise would be presumed. In *Bridgewater Academy v. Gilbert*, 2 Pick. 579, the point was that merely signing a subscription paper without more did not invite expenditure on the faith of it. See *Amherst Academy v. Cows*, 6 Pick. 427, 438; *Ives v. Sterling*,

6 Met. 310, 316. In this case the paper indisputably invited the committee to proceed.

A more serious difficulty if the acts are the consideration is that it seems to lead to the dilemma that either all acts to be done by the committee must be accomplished before the consideration is furnished, or else that the defendant's promise is to be taken distributively and divided up into distinct promises to pay successive sums as successive steps of the committee may make further payments necessary and may furnish consideration for requiring them. The last view is artificial and may be laid on one side. In the most noticeable cases where a man has been held entitled to stop before he has finished his payments, the ground has not been the divisibility of his undertaking but the absence of consideration, which required the court to leave things where it found them. *In re Hudson*, 54 L. J. Ch. 811. *Presbyterian Church of Albany v. Cooper*, 112 N. Y. 517. As against the former view, if necessary, we should assume that the first substantial act done by the committee was all that was required in the way of acts to found the defendants' obligation. See *Amherst Academy v. Cows*, 6 Pick. 427, 438. But if that were true, it would follow that as to the future conduct of the committee their promise not their performance was the consideration, and when we have got as far as that, it may be doubted whether it is not simpler and more reasonable to set the defendants' promise against the plaintiffs' promise alone. We are inclined to this view, but do not deem a more definitive decision necessary, as we are clearly of opinion that, one way or the other, the defendants must pay.

What has been said pretty nearly disposes of a subordinate point raised by the defendants. It is argued that, by notice pending performance that they would not go on with the contract, the defendants, even if they incurred a liability to damages, put an end to the right of the plaintiffs to go on and to recover further assessments, as in the case where an order for work is countermanded at the moment when performance is about to begin under the contract, *Davis v. Bronson*, 2 No. Dak. 300, or when at a later moment the plaintiff was directed to stop, *Clark v. Marsiglia*, 1 Den. 317, followed by many later cases in this country. See *Collins v. Delaporte*, 115 Mass. 159, 162.

We assume that these decisions are right in cases where the continuance of work by the plaintiff would be merely a useless enhancement of damages. But we are of opinion that they do not apply. In the first place it does not appear that such a notice was given. The first definite notice and the first breach was a refusal to pay on demand. At that time the liability was fixed, and the damages were the sum demanded.

In the next place if a definite notice had been given by the defendants in advance that they would not pay, whatever rights it might have given the plaintiffs at their election, *Ballou v. Billings*, 136 Mass. 307, it would not have been a breach of the contract, *Daniels v. Newton*, 114 Mass. 530, and it would not have ended the right of the plaintiffs to go on under the contract in a case like the present, where there was a common interest in the performance, and where what had been done and what remained to do probably were to a large extent interdependent. *Davis v. Campbell*, 93 Iowa, 524. *Gibbons v. Bente*, 51 Minn. 499. *Cravens v. Eagle Cotton Mills Co.* 120 Ind. 6. See *Frost v. Knight*, L. R. 7 Ex. 111, 112; *Johnstone v. Milling*, 16 Q. B. D. 460, 470, 473; *Dalrymple v. Scott*, 19 Ont. App. 477; *John A. Roebling's Sons' Co. v. Lock Stitch Fence Co.* 130 Ill. 660, 666; *Davis v. Bronson*, 2 No. Dak. 300, 303.

Before leaving the case it is interesting to remark that the notion rightly exploded in *Cottage Street Church v. Kendall*, 121 Mass. 528, 530, 531, that the subscription of others than the plaintiff may be a consideration, seems to have remained unquestioned with regard to agreements of creditors to accept a composition. Compare the remarks of Wells, J., in *Perkins v. Lockwood*, 100 Mass. 249, 250, (*Farrington v. Hodgdon*, 119 Mass. 453, 457, *Trecy v. Jeffs*, 149 Mass. 211, 212, *Emerson v. Gerber*, 178 Mass. 130,) with what he says in *Athol Music Hall Co. v. Carey*, 116 Mass. 471, 474.

It is not argued that whatever contract was made was not made with the plaintiffs. *Sherwin v. Fletcher*, 168 Mass. 413.

Demurrer overruled; exceptions overruled.

E. F. McClennen, for the defendant Auerbach.

B. N. Johnson, for the plaintiffs.

FREDERIC F. HASKELL, trustee, vs. JOSEPH F. MERRILL
& others.

Suffolk. March 20, 1901. — May 23, 1901.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

Equity Practice, Objection of remedy at law, Exceptions to Master's report, Findings of fact. *Pledge*, Constructive delivery. *Mortgage, Of Chattels*, Unrecorded.

The objection to jurisdiction in equity that the plaintiff has an adequate remedy at law cannot first be taken after a master's report has been filed.

Exceptions to a master's report based on evidence cannot be considered unless the evidence is reported.

Exceptions will not lie to a master's report on the ground that he used the words "loan," "security" and "delivery" in his findings thereby stating conclusions of law from facts. Such words by stating a conclusion allege by implication that facts exist which justify it. If it becomes material to separate the pure facts, the party wishing this can ask for a ruling.

An owner of machinery attempted to pledge or mortgage it by giving an unrecorded bill of sale of it and retaining possession of the property. After the transaction, the pledgor paid the attempted pledgee a monthly rent for the use of the machinery. *Semble*, that the fact that the parties went through the form of paying and receiving the rent although evidence of a change of possession did not conclusively establish it.

St. 1883, c. 73, provides that an unrecorded mortgage of personal property "shall not be valid against any person other than the parties thereto." By the United States bankruptcy act of 1898 the title to all property which the bankrupt before the filing of the petition "could by any means have transferred or which might have been levied upon and sold under judicial process against him" is vested in the trustee in bankruptcy. Under these statutes the holder of an unrecorded bill of sale from a bankrupt given as security for a loan and purporting to convey machinery which remained in the bankrupt's factory has no title as against the trustee in bankruptcy.

BILL IN EQUITY by the trustee in bankruptcy of Joseph F. Merrill to have certain real estate in the name of the bankrupt's wife declared to be a part of his estate in bankruptcy, and also to establish title to certain machinery contained in the bankrupt's factory at No. 22 Norfolk Avenue in Boston, filed June 6, 1900.

In the Superior Court the case was referred to Lewis G. Farmer, Esquire, as master, who reported as follows:

"So far as the real estate is concerned, I find that the evidence shows that the bankrupt has no beneficial interest in it, or such that the trustee in bankruptcy can, in any way, avail himself of

it, and I understand that the counsel are agreed upon that point, so that no detailed report of the evidence upon that subject is necessary.

"I find, however, that the bankrupt, in 1894, went into the business of manufacturing shoe thread at No. 22 Norfolk avenue, Boston, and at that time he bought about five thousand dollars' worth of machinery, all of which was paid for before the date of the filing of his petition in bankruptcy; that in January, 1896, being in need of money, he applied to one LeRoy F. Hodge, one of the defendants in this suit, who had done teaming and other work for him in the past, to assist him, proposing to secure him by a mortgage upon the machinery. Mr. Hodge, after carefully examining the property and considering the subject of the loan for a week or two, finally concluded to let him have \$1,600, and take a bill of sale of the machinery as security, and this transaction was carried out on the twenty-third day of January, 1896, after which date, as a part of the agreement between the parties, the bankrupt paid to Hodge \$22 a month rent for the use of the machinery, but paid no interest as such, nor has he paid any part of the principal.

"The property has been taxed to J. F. Merrill and others, and the taxes have always been paid by Merrill. After the bill of sale was given, certain other machinery was purchased to the amount of \$1,317.36, of which \$1,300 was expended to complete some special machinery which was already in the factory, and had been there from the first; but no new bill of sale or other instrument was given to cover these additional purchases. Two machines were also exchanged for new ones, and the difference in cost paid after the bill of sale was given, all of which was done with Hodge's knowledge and approval. I find, however, that when the bill of sale was given it was unaccompanied by any delivery of the property, and there has been no delivery of the property, either actual, symbolical or constructive, since that time.

"I find, if it is material, that when the bill of sale was given, Hodge was not in the shop, and that although he was frequently there afterwards in the course of his business with the bankrupt and otherwise, he never did anything more than to look at the property, and consult with the bankrupt about it. He never

made a return of the property to the assessors of the city of Boston, and apparently never exercised any ownership over the property, which remained in the possession of the bankrupt continuously from the time of its original purchase down to the date of the filing of his petition in bankruptcy. There was certain insurance upon the property at the time the bill of sale was given standing in the name of the bankrupt, but no change was made to cover the interest of Hodge, as it might appear. After the date of the bill of sale, Jan. 23, 1896, certain policies were taken out in the names of Merrill and Hodge, and on March 5, 1898, certain policies standing in the name of Merrill alone were indorsed to cover Merrill and Hodge, as their interests might appear, and were made payable in case of loss to Hodge; but before the latter date no policies were so indorsed, nor were any taken out in the names of Merrill and Hodge, or Hodge alone.

"It is apparent that both the bankrupt and Hodge supposed that there had been a transfer of the title to this machinery to Hodge as security for his loan to the bankrupt, but unless a delivery of the property can be predicated from the evidence herein reported, I do not see why the title to the machinery did not remain in the bankrupt after the date of the bill of sale, and up to the time of his bankruptcy, and that it, therefore, passed to his trustee, the plaintiff in this bill."

The defendant Hodge filed thirteen exceptions to the foregoing report, all of which were overruled by a decree of the Superior Court, from which no appeal was taken.

Subsequently the case came on to be heard by *Hardy, J.*, who made a decree, ordering that the master's report be accepted and allowed, and adjudging and declaring that the machines described in the bill were the property of Joseph F. Merrill at the time of the adjudication in bankruptcy, and passed to and were at that time the property of the plaintiff, as trustee in bankruptcy; and further ordering that the defendant Joseph F. Merrill forthwith deliver and surrender the machines to the plaintiff, and that the defendant LeRoy F. Hodge refrain from making or asserting any title to them under or by reason of his bill of sale; and further declaring that the plaintiff was authorized to take possession of the machines and to hold and dispose of them as trustee in bankruptcy. From this decree the defendant Hodge appealed.

P. J. Casey, for the defendant Hodge.

R. O. Harris & F. F. Haskell, for the plaintiff.

HOLMES, C. J. This is a bill by a trustee in bankruptcy to recover property alleged to belong to the bankrupt's estate. The case was sent to a master, and exceptions were taken by the defendant Hodge to his report. These were overruled, and no appeal was taken. Afterwards the report was accepted and a decree was entered for the plaintiff. From this final decree an appeal was taken. The only question before us is whether the decree was warranted on the pleadings and report.

Both sides have argued the exceptions as if they were open, and therefore we think it proper to say that we see nothing in them. The objection to the jurisdiction in equity that there was an adequate remedy at law, comes too late. *Jones v. Keen*, 115 Mass. 170. *Crocker v. Dillon*, 133 Mass. 91. *Parker v. Nickerson*, 137 Mass. 487. *Whiting v. Burkhardt*, 178 Mass. 535. That of multifariousness is not argued. So far as objections are based on evidence it is enough to say that the master was not ordered by the court or asked by the parties to report it. *Nichols v. Ela*, 124 Mass. 333, 335. *Freeland v. Wright*, 154 Mass. 492. The objection to findings that express in a single word, such as "loan," "security," "delivery," a conclusion of law from facts, on the ground that the constituents should have been stated, would interdict an important part of the English language. The function of such words often has been analyzed. *Windram v. French*, 151 Mass. 547, 551. *Commonwealth v. Clancy*, 154 Mass. 128, 132. *Alton v. First National Bank of Webster*, 157 Mass. 341, 343. *Evans*, Pleading, (1st ed.) 48, 139, 143-146, 164. By stating the conclusion they allege by implication that facts exist which justify it. If for any reason it is material to go further, rulings can be asked which will separate the pure facts. Formerly the plaintiff's allegation of title was analyzed when necessary by giving color in pleading. *Evans*, Pleading, 149-157. An exception to an alleged exclusion of evidence is not argued. It does not appear even that any such evidence was offered.

The only property concerned under the master's report is machinery found to have been transferred by a bill of sale to the defendant Hodge as security for advances. The instrument seems not to have been recorded, and the master finds in terms

that there never was any delivery of possession. An exception taken to this finding is less frivolous than the others, since earlier in the report it is stated that after giving the security the bankrupt paid monthly rent for the use of it. We assume for the purposes of decision that the form of such a payment would have been evidence of a sufficient change of possession, *Moors v. Wyman*, 146 Mass. 60, 63, and there may be some ground for apprehending that the master adopted a different view. But we cannot say that the fact that the form of paying rent was gone through conclusively establishes the change. *Harlow v. Hall*, 132 Mass. 232. It should be mentioned, too, that a part of the machinery at least seems not to be the same as that covered by the mortgage.

Coming, then, to the question whether the report justifies the decree, it follows that Hodge has no title as against the plaintiff. St. 1883, c. 73. *Chick v. Nute*, 176 Mass. 57. *Bingham v. Jordan*, 1 Allen, 373. It is true that under the last bankrupt act it looked a little as if property situated like this might be at a loss for a master. For while this court denied it to the mortgagee the United States courts denied it to the assignee in bankruptcy. *Winsor v. McLellan*, 2 Story, 492. *Ex parte Dalby*, 1 Lowell, 431. *Coggeshall v. Potter*, Holmes, 75. *Stewart v. Platt*, 101 U. S. 731, 738, 739. The ground of the United States decisions was that the assignee is the bankrupt. Lowell, Bankruptcy, § 309. And no doubt it is traditional to regard such assignees as universal successors who like executors or other universal successors represent the person of him to whom they succeed. *Chipman v. Manufacturers' National Bank*, 156 Mass. 147, 149. *Phosphate Sewage Co. v. Molleson*, 5 Ct. of Sess. Cas. (4th Ser.) 1125, 1138. Nevertheless in *Bingham v. Jordan* the statute was held to invalidate the mortgage as against assignees in insolvency; and this amounted to a decision that a fictitious identity of person did not satisfy the words of our statute which make the mortgage void "against any person other than the parties thereto." The view taken by Judge Lowell was almost directly contradictory to this decision, which was that an assignee in insolvency was not a "party thereto."

The construction of a State statute is a matter upon which the decision of the State court is final. If the only ground on which the right of the assignee to property subject to an unrecorded

mortgage is that given by Judge Lowell, in Lowell, Bankruptcy, § 309, the answer is that the United States courts are not at liberty to say that an assignee is a party to a mortgage given by his bankrupt when this court has said that he is not. But it seems to be unnecessary to discuss that question, because in *Ex parte Dalby*, 1 Lowell, 431, 433, it is admitted that there is a distinction when the assignee takes all that could have been taken on execution against the bankrupt at the time of the bankruptcy. Under the present statute the trustee takes "property which prior to the filing of the petition he [the bankrupt] could by any means have transferred or which might have been levied upon and sold under judicial process against him." U. S. St. 1898, c. 541, § 70. It is very plain that the machinery is such property. *Bingham v. Jordan*, 1 Allen, 373, *Smith v. Howard*, 173 Mass. 88, and therefore it passes to the plaintiff.

Decree affirmed.

ROBERT OBERY vs. WENTWORTH V. LANDER.

Middlesex. March 21, 1901. — May 23, 1901.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

Sale, Indivisible offer, Evidence of acceptance, Passing of title, Delivery.

The plaintiff covenanted to sell and deliver to the defendant the capital stock of a certain company he then owned consisting of two hundred shares and comprising in all \$6,000 par value, and "in furtherance of this option" agreed to at once indorse the certificates in blank and deliver them to X. to be by him held in escrow and delivered to the defendant in the following manner: On payment of \$1,000 within fifteen days from the date hereof X. to deliver to the defendant forty shares, and on payment of \$2,000 within thirty days thereafter eighty shares, and on a further payment of \$2,000 within thirty days after the second payment, the remainder of the shares. "It is understood and agreed that this option expires and becomes null and void if not accepted within fifteen days and in that event X. is to immediately return to me said certificates delivered to him in escrow." The defendant paid the first \$1,000 and received the stock for it and afterwards refused to make further payments. There was evidence that the defendant said to the plaintiff's attorney "that he would not be forced to pay for the certificates; that he would pay for them when he got good and ready." *Held*, that the offer was an indivisible one to sell the whole lot of two hundred shares, and that there was evidence of its acceptance. Even if the defendant could make a payment and receive stock under the offer without

accepting it, his statement to the plaintiff's attorney might be found to imply an admission that he bought the stock. *Held, also*, that evidence of the market value of the shares, offered by the defendant to show that there was little change of value from the contract price, rightly was excluded, as the action was not for the breach of an executory contract but for goods bargained and sold and this action would lie. *Semble*, that even an action for goods sold and delivered might lie.

CONTRACT to recover \$4,000, the balance of the agreed price for two hundred shares of stock of the Mercer Cell Company alleged to have been purchased from the plaintiff by the defendant. Writ dated October 23, 1899.

At the trial in the Superior Court, before *Gaskill, J.*, it appeared that the plaintiff signed in duplicate the following agreement under seal:

"In consideration of one dollar and other valuable considerations to me in hand paid by W. V. Lander of Rumford Falls, Maine, I hereby offer to sell and deliver on demand to said Lander the capital stock of the Mercer Cell Company I now own, consisting of two hundred shares and represented by certificates numbered 30, 31, 32, 33 and 34 respectively, and comprising in all five thousand dollars par value. And in furtherance of this option I hereby agree to at once indorse said certificates in blank and deliver the same to George D. Bisbee of Rumford Falls, Maine, to be by him held in escrow and delivered to said Lander in manner and condition following:

"On payment by said Lander of one thousand dollars (\$1,000) within fifteen days from the date hereof, said Bisbee is to deliver to said Lander or his legal representatives forty shares, and on payment of two thousand (2,000) dollars within thirty days thereafter, said Bisbee is to deliver eighty shares, and on a further payment of two thousand (2,000) dollars within thirty days after the second payment, said Bisbee shall deliver the balance of said shares. Said Bisbee to remit to me by cashier's check the amount received from said Lander, as above, from time to time.

"It is understood and agreed that this option expires and becomes null and void if not accepted within fifteen days and in that event said Bisbee is to immediately return to me said certificates delivered to him in escrow.

"It is further agreed and understood that certain other shares

not exceeding five hundred dollars (\$500) par value of which I am the owner, but title to which may be disputed by other parties, shall come within this option and as soon as a proper transfer can be made the same shall be transferred to said Lander, and in that event said Lander shall pay me a further payment of twenty-five dollars (\$25.00) for each share so transferred. It is the meaning and intention of this option that I am to receive twenty-five dollars (\$25.00) for each and every share transferred, and it is agreed and understood that in the event of any adjustment between myself and the other present stockholders in which adjustment I may transfer shares to other said present stockholders, this option shall not cover any stocks so transferred.

"In witness whereof I have hereunto set my hand and seal this second day of August, A. D. 1899."

One of the duplicate originals of this agreement was sent to the defendant in Maine and the other was sent to Bisbee, named in the agreement, together with the certificates of stock indorsed in blank by the plaintiff in accordance with the terms of the agreement. On August 22, 1899, Bisbee sent to the plaintiff Lander's check for \$1,000 in the following letter: "I hand you herewith Wentworth V. Lander's check duly certified for one thousand dollars, in payment of the first instalment of 40 shares of capital stock Mercer Cell Co. I should have sent it several days ago as it was in my hands."

Mr. Irwin, attorney for the plaintiff, testified that on September 6, 1899, he mailed to Bisbee the following letter: "Several weeks ago I forwarded you certificates No. 30, 31, 32, 33 and 34, being (in the total) 200 shares of the capital stock of the Mercer Cell Company, together with an option to W. V. Lander for the purchase of the same. The time within which the said option was to be accepted expired some time since. My client, Mr. Robert Obery, owner of the stock, left word at my office several days ago asking me to write for the return of the certificates, but I have been away on a vacation and have but just returned here. In view of this delay on my part I ask that you will be good enough to send me the certificates by return mail, as my client has an opportunity to sell the stock at this time. Kindly send the certificates by registered mail, and oblige, very truly yours, J. J. Irwin."

Mr. Irwin further testified as follows : " Mr. Bisbee never returned the stock certificates. As the result of the correspondence between Mr. Bisbee and myself I called at the defendant's office in Boston some time in October, 1899. I told the defendant that I had received the first payment in accordance with the terms of the contract, for the plaintiff ; that I had turned the same over to the plaintiff and that the second payment was now past due, and I wanted to know whether he was going to pay, or not. I told him that I had reason to believe that at the meeting of the stockholders of the Mercer Cell Company, held in the meantime, that he had voted on this stock that is recited in the option and I asked him to show me the stock certificate book and he refused to do so, stating that he did not have it. I told him that I had a letter, which I think I produced from my pocket at the time and read from the letter in which Mr. Bisbee advised me that the stock certificate book was in the hands of the defendant ; the defendant hesitated, when I showed him the letter, and then said that he had just sent the book back. I read the following portion of the letter to the defendant : ' Mr. Lander is treasurer and has the stock book. I have again written him and asked him to examine and see what certificates Mr. Obery had and what record he has of them. His office is room 504, John Hancock Bldg., Boston.'

" We had further conversation respecting one of the certificates of stock. I cannot say which certificate, it was probably 31 or 32. I told the defendant that he must have (from the information that I had from Mr. Bisbee) two of these certificates of stock. He had paid for one. I also stated that I had been in correspondence with Mr. Bisbee respecting the matter and that he must have this second certificate of stock, and he denied having it and said he had received but one from Mr. Bisbee, and that he did not have the second one ; that he would not be forced to pay for the certificates ; that he would pay for them when he got good and ready."

The defendant admitted that \$1,000 had been paid by him.

Sewall A. Dinsmore, a witness for the plaintiff, on cross-examination testified that the contract price of the stock, \$25 per share, was supposed to be a fair value for the stock at that time. He was then asked the two following questions which

were objected to by the plaintiff and excluded by the judge, the defendant excepting: "Now what was it worth here in the market two months after that time?" and "Was there any change in value?" The defendant's counsel stated that he offered this evidence on the ground that, if the plaintiff should be entitled to recover anything, he would be entitled to recover only the difference between the market value here and the contract value. The judge then said: "He does not sue to recover for a breach of the contract at all, as I recall it, in his declaration, except as far as there was a breach of the payment of the specific sum agreed to be paid. So it is either that, or nothing, is it not?" This was assented to by the plaintiff's counsel.

At the close of the evidence, the defendant asked the judge to instruct the jury to bring in a verdict for the defendant on the ground that there was no evidence for a jury to consider of the acceptance of the option by the defendant. The judge refused to give this instruction but left to the jury, by consent of parties, the single question whether or not there had been an acceptance of the option by the defendant, or some one expressly authorized for that purpose; the defendant by his counsel not waiving his exception to the refusal of the court to direct a verdict for him.

The jury returned a verdict for the plaintiff in the sum of \$4,240; and the defendant alleged exceptions to the ruling of the judge excluding the questions to show the market value of the stock, and to his refusal to instruct the jury to bring in a verdict for the defendant.

J. W. Spaulding, for the defendant.

S. A. Fuller, (*J. J. Irwin* with him,) for the plaintiff.

HOLMES, C. J. This is an action upon a contract for the purchase of certain stock by the defendant from the plaintiff. The plaintiff covenanted to sell to the defendant on demand "the capital stock of the Mercer Cell Company I now own, consisting of two hundred shares," and at once to indorse and deliver the same to one Bisbee, to be held by him in escrow and to be delivered to the defendant, on payment of \$1,000 within fifteen days, forty shares; on payment of \$2,000 within thirty days thereafter, eighty shares; and on payment of \$2,000 within thirty days after the second payment, the remainder of the

shares. It was stipulated that "this option expires . . . if not accepted within fifteen days." The stock was indorsed and delivered to Bisbee at once. At the trial the defendant excepted to a refusal to rule that there was no evidence that the defendant had agreed to purchase the shares. The defendant also excepted to the exclusion of evidence of the market value of the stock.

As to evidence of the defendant's acceptance of the offer contained in the plaintiff's covenant, it would seem to be enough that the defendant paid the first thousand dollars and received the stock for it. The defendant argues, to be sure, that this was not an acceptance of the whole offer, on the ground that the offer was of three several sales, and also that the requirement that the option should be accepted within fifteen days shows that acceptance and the first payment were different things. We think it so plain that there was but one offer of the whole lot of two hundred shares, although to be paid for and delivered in parcels, that we shall spend no argument upon the matter. *Barrie v. Earle*, 143 Mass. 1. We think it equally plain that the requirement as to acceptance is merely an emphasizing of the necessity for action within the time named, and that it does not imply that the defendant could make a payment and receive stock under the offer without accepting it. If, however, it were necessary to go further, the defendant's statement to the plaintiff's attorney "that he would not be forced to pay for the certificates; that he would pay for them when he got good and ready," implied an admission that he had bought the stock, or at least might be found to imply it. It is unnecessary to consider the acts of the defendant's agent, which also showed an agreement to take the stock.

The other exception goes on the footing that this is an action for damages for breach of an executory contract to purchase. We understand the declaration to be not for damages but for the price. But, whatever may be the true construction, the judge having intimated that he took it so and the plaintiff's counsel having assented to the interpretation, we must assume that the case went to the jury on that footing, and no wrong was done to the defendant if on the facts such an action could be maintained. Such an action could be maintained because

the plaintiff had done all that there was to be done by him under his contract, and had put the stock into an adverse hand. All that the defendant had to do to get a delivery of the stock was to pay as he had agreed. *Frazier v. Simmons*, 139 Mass. 531. The decisions in this Commonwealth have gone very far in support of an action even for goods sold and delivered. *Nichols v. Morse*, 100 Mass. 523. *Rodman v. Guilford*, 112 Mass. 405, 407. *McLean v. Richardson*, 127 Mass. 339, 345.

Exceptions overruled.

EVERETT C. BUMPUS vs. JULIA B. FRENCH.

Suffolk. March 21, 1901. — May 23, 1901.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

Constitutional Law, Provisions securing personal liberty. *Insane Person*, Appointment of temporary guardian without notice.

Assuming, that the constitutional provisions securing personal liberty apply to proceedings for the protection of persons alleged to be insane, and that a law authorizing the appointment of a permanent guardian of an insane person without notice would be void, — St. 1900, c. 345, providing for the appointment of temporary guardians of insane persons without notice is constitutional. Such an appointment is founded on necessity and is limited to the time necessary to determine whether a permanent guardian should be appointed.

Seem, that under St. 1900, c. 345, providing for the appointment of temporary guardians of insane persons, although the appointment may be made without notice, it cannot take effect without the knowledge of the party concerned, who may apply at once to have the decree revoked and is entitled to a hearing if he wants it — a right implied from the nature of the case.

APPEAL from a decree of the Probate Court allowing the account of Everett C. Bumpus, Esquire, temporary guardian of Julia B. French. The petition for the appointment of a temporary guardian was filed in the Probate Court October 13, 1900, at the same time that a petition for the appointment of a permanent guardian was filed, both petitions alleging that Julia B. French was an insane person and incapable of taking care of herself, and on the same day the temporary guardian was appointed. On October 18, 1900, Julia B. French appeared by counsel and filed a petition for the removal of the temporary guardian, which was set down for hearing from time to time at

the same times as the principal petition. On February 21, 1901, the petition for the appointment of a permanent guardian was dismissed by *Grant, J.*, who decided that Julia B. French was not an insane person and did not require a guardian, and ordered that she be discharged from the temporary guardianship then in force. Thereupon the temporary guardian presented to the court his account as such guardian. The account was allowed, and from the decree allowing it the present appeal was taken. The objection to the allowance of the account was solely on the ground that St. 1900, c. 345, under which the temporary guardian was appointed, is unconstitutional.

It was agreed that Julia B. French had no notice of the filing of the petition for the appointment of a temporary guardian until after the decree had been entered thereon, and was not present or represented by counsel at the hearing on that petition. The statute does not require such notice. Upon the petition for the appointment of a permanent guardian, a citation was duly issued and served upon her on October 15, 1900, and in response thereto she appeared by counsel as above stated.

The case came on to be heard, before *Knowlton, J.*, who reserved it upon the appeal and agreed statement of facts for the determination of the full court.

R. M. Morse, (L. Bass, Jr. with him,) for Julia B. French, the appellant, contended that St. 1900, c. 345, is in violation of the provision of article 12 of the Massachusetts Declaration of Rights, that no subject shall be deprived of his liberty but by the judgment of his peers, and the provision of the Fourteenth Amendment of the Constitution of the United States, that no State shall deprive any person of liberty without due process of law.

A. Lord, (J. B. Sullivan, Jr. with him,) for the temporary guardian.

HOLMES, C. J. This is an appeal from the allowance of the account of a temporary guardian appointed by the Probate Court without notice to the ward, the appellant, pending a petition for the appointment of a permanent guardian on the ground of insanity. This petition was dismissed after a hearing, and at the same time the appellant was discharged from the temporary guardianship. The objection to the allowance of the account is taken on the single ground that the statute under which the

guardian was appointed, St. 1900, c. 845, is contrary to article 12 of the Massachusetts Declaration of Rights, and to the Fourteenth Amendment of the Constitution of the United States. This question is the only one argued, and is the only one which we shall consider. The appellant did not file a petition to revoke the decree appointing the guardian but only a petition that he might be removed.

We shall not consider whether the constitutional provisions relied on apply to proceedings for the protection of persons alleged to be insane. Woerner, Guardianship, 392, 393. *Black Hawk County v. Springer*, 58 Iowa, 417. *Chavannes v. Priestley*, 80 Iowa, 316. For assuming that they apply we are of opinion that the statute is constitutional. The great provisions intended to protect liberty and property cannot be read as extending with mathematical logic to every case where there is an unpaid for diminution of property rights or a temporary restraint of personal freedom without a hearing of both sides in court. It does not need argument to show that sometimes it may be necessary to impose such a temporary restraint without the delay required for a hearing and even before notice to the party restrained. Not to mention other instances familiar to the law, the necessity in cases of alleged insanity to protect the property until the principal question is decided has been recognized and acted upon many times under or possibly even without special authority of statute. *Matter of Heli*, 3 Atk. 635. *In re Pountain*, 37 Ch. D. 609. *In re Lawler*, Ir. Rep. 8 Eq. 506, 515. Shelford, Lunacy, (1st ed.) 127. *Matter of Wendell*, 1 Johns. Ch. 600, 603. *Matter of Kenton*, 5 Binn. 618. *In re Harris*, 7 Del. Ch. 42. And so, even more clearly, as to restraining the person. *Dowdell, petitioner*, 169 Mass. 387. *Denny v. Tyler*, 3 Allen, 225, 228, 229. *Matter of Oakes*, 8 Law Rep. 122, 124, 125.

A distinction is taken on the ground that in this case a guardian is appointed, and that this appointment is a judicial act and changes the status of the appellant. But the change is subject to instant revocation if it should appear to have been made under a mistake. Although the appointment may be made without notice, it cannot take effect without the knowledge of the party concerned, who may apply at once to have the decree revoked and is entitled to a hearing if he wants it. The act does not say

so in terms, but we are of opinion that the right is implied, and that this is all that the Constitution requires. *Le Donne, petitioner*, 173 Mass. 550, 552. *Dowdell, petitioner*, 169 Mass. 387. No doubt caution should be used and would be used to make sure that the temporary ward should have access to the court, and that means should be furnished to those representing him and opposing the principal petition. Shelford, *Lunacy*, (1st ed.) 127. No doubt, also, the appointment should be and is limited to the time necessary for the decision of the principal matter. St. 1900, c. 345, §§ 1, 5. *In re Lawler*, Ir. Rep. 8 Eq. 506, 514-516. But the mere fact that the temporary limitation of the ward's power is effected by the order of a judge and the appointment of a guardian, rather than by arbitrary physical constraint relying on necessity alone for its warrant, certainly does not bring up any new constitutional bar.

If, in the light of *Chase v. Hathaway*, 14 Mass. 222, embodied in Rev. Sts. c. 79, § 9, (see Commissioners' notes,) Gen. Sts. c. 109, § 8, Pub. Sts. c. 139, § 7, see *Gibson, appellant*, 154 Mass. 378, 380, 381, we assume that the appointment of a permanent guardian without notice would be void, and that the foregoing reasoning would not be enough to save it even when the court was satisfied that personal notice would be unsafe, (see *Matter of Blewitt*, 131 N. Y. 541, 547,) still we are of opinion that an appointment which in form and essence is provisional and temporary, and is founded on and limited by necessity, may be valid without notice, and that it was valid in this case. See *Porter v. Ritch*, 70 Conn. 235.

The practical working of the law was exemplified here. The petitions for the appointment of a permanent and a temporary guardian both were filed on October 13, 1900. Notice under the former was issued on the same day and the temporary guardian was appointed. On October 18 the appellant filed a petition for his removal, and this and the principal matter were heard and decided together. As we have said, there was no petition for a revocation of the decree, and it is apparent that when the appellant came before him the judge did not think it proper to review his action until he was ready to dispose of the whole case. No wrong was done, and there is no danger of wrong under a proper administration of the act.

Decree affirmed.

PIERCE F. LONERGAN vs. C. SIDNEY WALDO.

Suffolk. November 14, 1900. — May 24, 1901.

Present: HOLMES, C. J., KNOWLTON, BARKER, HAMMOND, & LORING, JJ.

Damages, For Breach of Contract, Consequential contemplated by the parties.

If goods sold and paid for are not delivered, the measure of damages usually is their market value at the time and place at which they should have been delivered, but special circumstances may make the vendee's actual loss greater than the sum given by this common rule. When the special circumstances are known to both parties and each has contracted with reference to them, the party in fault justly may be held to make good to the other whatever damages he has sustained as the reasonable and natural consequences of a breach under the circumstances contemplated by the parties. *Semble*, that a vendor may always avoid such consequential liability by expressly declining to assume it, as in order to hold him his assent must be found from the facts. *Whether* one who like a common carrier is compelled to render the service for which he contracts would be held to the same liability from his undertaking to do the service with knowledge of the special circumstances and without a protest, *quære*.

One who agrees to deliver drain pipe to a contractor for use in a ditch already dug, and who is notified that delay in delivery will result in the washing in of the ditch in case of rain, may be found liable for the expense incurred by the contractor in re-digging the ditch, which by reason of delay caused by non-delivery of the pipe had been washed in by rain as anticipated.

CONTRACT by a contractor to lay drain pipe to recover \$1,240, the expense of re-digging a ditch washed in by a rain storm by reason of the delay caused by the failure of the defendant to deliver one hundred and fifty feet of six inch drain pipe ordered of him and paid for by the plaintiff, the defendant having agreed to deliver the pipe after notice from the plaintiff that it was needed at once and that, if a rain storm occurred, the ditch would cave in. Writ dated January 27, 1899.

At the trial in the Superior Court, before *Richardson, J.*, the judge took the case from the jury and, in doing so, ruled as follows: "I do not think that the plaintiff can recover in this action, which is an action of contract, for the damage done to the trench or ditch by the rain storm, or for the expenses incurred in repairing that damage. The plaintiff's counsel says that is the damage which he seeks to recover for, and the other damage will be so slight that he does not care to go to the jury

upon it. In view of this statement I will order a verdict for the defendant, and the plaintiff excepts."

The verdict was entered as directed ; and the plaintiff alleged exceptions. The evidence is fully described in the opinion of the court.

A. S. Hayes, for the plaintiff.

G. A. O. Ernst, for the defendant.

BARKER, J. The question whether the verdict was ordered rightly must be considered upon the state of facts most favorable to the plaintiff, which fairly could have been found if the case had been left to the jury.

He contended that he was entitled to large damages because of the caving in of a ditch resulting from the non-delivery of six inch drain pipe bought of the defendant on May 1, 1898, for the price of \$13.50, then paid.

From his testimony it could be found that he first ordered the pipe on Thursday, April 28, by telephone, and that in giving the order he said that he was out of such pipe, and had his ditch all ready waiting for it, and a great deal of material on the bank, and that he could not leave it there very long ; also that the answer to his order was that the pipe would be sent in the afternoon ; that the pipe did not come, and the plaintiff several times told the defendant's agent over the telephone that it was necessary that the pipe should come out ; that if a rain storm should come there was no possible chance of saving the ditch, as they were down twenty-four feet and there was a large amount of material on the banks.

The plaintiff further testified that on Monday, May 1, he was informed that the trouble was that he had reached the limit of his credit with the defendant ; that he then went to the latter's office, was referred from one man to another and another, to the last of whom he told the dangerous condition he was in at the work and how much he was in need of the pipe ; that he told them the condition of the ditch, that it was down twenty-four feet, and about nine or ten feet wide, and would certainly cave in if there should be a rain storm ; that they desired cash for any more goods, and thereupon he gave a check for the price of the pipe, and asked if they would attend to it right away ; that they said that they would, that the pipe would be out there

perhaps before he was, and thereupon he went back to the work ; that at noon on Monday the pipe had not reached the work, and he then telephoned again and asked where the pipe was, and was answered that it would be out there in the afternoon sure ; that he then waited until Tuesday morning, and then asked by telephone why the defendant would not send the pipe, saying that the defendant knew the plaintiff's condition at the work, and what the consequence would be, and was answered that the defendant would immediately attend to it ; that no pipe came on that day, Tuesday, May 2, and none came on Wednesday, May 3, until after the plaintiff's men had gone home ; and that the pipe which so came was not six inch pipe as ordered and purchased but eight inch pipe which he could not place in the ditch, and which he would not be allowed to use in it ; also that a rain storm came on during Wednesday night, and on Thursday about noon the ditch was washed in, at a loss to him of about \$1,240.

The plaintiff also testified that the ditch was sheathed with plank and was braced and that he had taken all the precautions to prevent its caving in which could be taken, and that the weather was threatening, and that he made no effort in any other direction to get the pipe. He also testified upon his cross-examination, as follows :

" Q. When they kept promising you and kept disappointing you, did you make any effort in any other direction to get that pipe? A. No.

" Q. Do you know that within an eighth of a mile from your place there was a store that had been established for thirty years which kept drain pipe, and which could have furnished you that pipe at practically a moment's notice? A. I think I had gone to them, as you have refreshed my memory, and I think I have got 6-inch pipe, all they had there, I think, I have bought —

" Q. You did buy some 6-inch pipe from Balkam, did you? A. I can't swear to it, but I am very sure I went down there for 6-inch pipe. I did n't buy any prior to this time.

" Q. You knew where the store was? A. I did n't know that they had 6-inch pipe.

" Q. You did n't inquire? A. I must have inquired if I found out that he had it. I think I was down to him to buy some nails — some things like that, little incidentals that we would want."

The defendant offered evidence tending to show that no conversations occurred over the telephone or at his store such as the plaintiff testified to; that nothing was said about the danger to the ditch; that no suggestion was made as to any special haste; that the pipe was sold to be, and was, delivered in the usual course of business the next day, May 2.

Experts called by the defendant testified that there was a perfectly practical way of protecting the ditch in question against caving in, and that if the plaintiff had used it the ditch would not have caved in.

Sewall D. Balkam, called by the defendant, testified that his place of business was, and had been since 1872, on Centre Street, Jamaica Plain, about five or six minutes' walk from where the plaintiff was at work on the corner of Weld Park and the same street, Centre Street; that at the time in question he dealt in six inch pipe, and had it in stock for sale, and that its then fair market value in Jamaica Plain, delivered at Weld Park, was ten to twelve cents a foot, or from \$15 to \$18 for one hundred and fifty feet.

In reply to a question from the court the plaintiff's counsel said that he did not claim to recover for any delay in delivery prior to May 1 when the pipe was paid for. In reply to another question from the court he said that he did not want to go to the jury on any question of damage other than the damage done by the washing in of the ditch, and the expense entailed in rebuilding the ditch.

The court ruled, on taking the case from the jury, "I do not think that the plaintiff can recover in this action, which is an action of contract, for the damage done to the trench or ditch by the rainstorm, or for the expenses incurred in repairing that damage. The plaintiff's counsel says that is the damage which he seeks to recover for, and the other damage will be so slight that he does not care to go to the jury upon it. In view of this statement I will order a verdict for the defendant, and the plaintiff excepts."

Upon this state of the evidence it could not be ruled as a matter of law that the plaintiff was negligent in relying wholly upon the expected delivery, and in making no effort to get pipe elsewhere; nor in the means which he used to protect the ditch

from caving in. It could be found from the evidence that the purchase and sale were made upon a full disclosure of the special circumstances to which the plaintiff testified, and that both parties acted upon full knowledge that the pipe sold was bought by the plaintiff to be used in a ditch such as was described in his testimony; and that at the time of the sale, the caving in of the ditch was to be apprehended reasonably as a consequence of delay, and if the delay should be caused by failure to deliver the pipe the caving in might be found to be a damage which ordinarily would follow the breach.

If goods sold and paid for are not delivered the measure of damages usually is their market value at the time and place at which they should have been delivered, with interest thereon. *Cutting v. Grand Trunk Railway*, 13 Allen, 381, 385. But special circumstances may make the vendee's actual loss greater than the sum given by this common rule. When owing to special circumstances such greater damages are in fact sustained it is clear that they cannot be recovered of the party in fault, unless the special circumstances which made it reasonable to expect that the greater damages would naturally ensue were, at the time when the contract was made, within the knowledge of both parties. *Batchelder v. Sturgis*, 3 Cush. 201, 204. *Cutting v. Grand Trunk Railway*, *ubi supra*. *Scott v. Boston & New Orleans Steamship Co.* 106 Mass. 468, 471. *Harvey v. Connecticut & Passumpsic Rivers Railroad*, 124 Mass. 421. *Swift River Co. v. Fitchburg Railroad*, 169 Mass. 326.

When the special circumstances are known to both parties, it is obvious that each may have contracted with reference to them; and that, if such was in fact the case, the party in fault may be held justly to make good to the other whatever damages he has sustained which were the reasonable and natural consequences of a breach under the circumstances so known and with reference to which the parties acted. In such cases the larger damages may be recovered, as having been in the contemplation of both parties, and as naturally resulting, under the special circumstances from the breach itself. *Cutting v. Grand Trunk Railway*, *ubi supra*. *Townsend v. Nickerson Wharf Co.* 117 Mass. 501, 503. *Manning v. Fitch*, 138 Mass. 273, 276.

But it is equally obvious that when special circumstances exist

and are known to both parties a vendor may decline to assume any larger responsibility for a breach of his engagement than that to which he would be subjected by the common rule of damages. If, in the present instance, the defendant upon being told of the condition of the ditch had notified the plaintiff that if the pipe should not be delivered seasonably the defendant would not be answerable for the loss if the ditch should cave, it would be unjust to hold the defendant for the loss. The defendant cannot be so held, justly, unless at the time of the sale he in substance assented that he would be so held.

It is not contended that there was an express assent. Therefore the vital question is whether such assent could have been found from the evidence. When one of two contracting parties stands in such a relation as compels him to render the service for which he contracts, as for instance in that of a common carrier, it might be unfair to infer, from his undertaking to do the service with knowledge of the special circumstances and without a protest that he assented to any unusual obligation. Upon this question we express no opinion. But in the present case the defendant was under no obligation to sell the pipe. He could contract or not as he chose. If, knowing all the circumstances, the defendant sold the pipe without any protest or statement that he would in no event be liable for a caving of the ditch, he might be found by the jury to have assented to be bound to pay damage for its caving if that should be caused by breach of his contract to deliver the pipe. See *Grébert Borgnis v. Nugent*, 15 Q. B. D. 85, 89; *Mayne, Damages*, (5th ed.) 41; *Horne v. Midland Railway*, L. R. 8 C. P. 131, 141; *Benjamin, Sales*, (6th Am. ed.) §§ 872, 874.

Therefore, upon the evidence, it was wrong to direct a verdict for the defendant.

Exceptions sustained.

JOHN F. IVARSON & another vs. DANIEL MULVEY.

Suffolk. December 7, 1900. — May 24, 1901.

Present: HOLMES, C. J., KNOWLTON, LATHROP, HAMMOND, & LORING, JJ.

Easement, Equitable Restriction.

A restriction on suburban land to continue for eight years only, that no dwelling house placed thereon "shall contain more than two tenants, or be constructed for more than two families," is violated by the construction of a house of three stories containing seventeen rooms available for three families, although the owner does not intend to use it for more than two families until the eight year limit of the restriction has expired.

Where a grantor in pursuance of a common scheme imposes restrictions on land sold to various grantees, he can waive his own right to enforce the restrictions but not that of any of his grantees.

BILL IN EQUITY by the respective owners of two houses on Woodlawn Street in that part of Boston called Jamaica Plain, to enforce against the defendant, who was constructing on that street a house adjoining that of one of the plaintiffs and opposite that of the other plaintiff, certain restrictions contained in the defendant's deed, filed September 27, 1899.

In the Superior Court the case was referred to a master, who reported, that the defendant had violated one of the restrictions in his deed by constructing a house for more than two families, but by reason of the fact that the restriction would continue in force only until January 1, 1902, and of other facts stated in the report, the plaintiffs were not entitled to equitable relief for the violation of the restriction by way of an injunction ordering the defendant to discontinue and remove his house, but were entitled to equitable relief by way of compensation in damages. The case was recommitted to the master to find and state what sum of money by way of damages, if any, should be assessed against the defendant and in favor of the plaintiffs, as compensation for the defendant's breach of the restriction, and the master, in a second report, found that there should be assessed against the defendant \$168 in favor of the plaintiff McNulty and \$224 in favor of the plaintiff Ivarson. The Superior Court by decree

ordered the defendant to pay the sums named to the plaintiffs respectively, and the defendant appealed.

The material facts found by the master are stated in the opinion of the court.

F. M. Davis, for the defendant.

C. G. Keyes, for the plaintiff, submitted the case on a brief.

LATHROP, J. This is a bill in equity by which the plaintiffs seek to enforce against the defendant certain restrictions contained in the deeds of all the parties, they having derived their respective titles from common grantors.

The master has found that these restrictions were imposed by the grantors in pursuance of a common scheme, which included not only the lots conveyed to the parties to this suit but also other lots in one large tract of land. These restrictions were not to continue later than 1902. All of the parties to this suit bought their lands in 1894.

One of the restrictions was: "That for the period of eight years from the date hereof, . . . no dwelling-house erected or placed on said land shall contain more than two tenements or be constructed for more than two families." On this point the master found that the defendant's house was carried up three stories, and contained seventeen rooms, with a flat roof; that the defendant admitted that the construction adopted by him was available for three families, but testified that it was not to be used for more than two until after the eight year limit of the restriction had expired. It seems to us very clear that the defendant's house was constructed for more than two families, and was in violation of the restriction.

The point chiefly relied upon by the defendant was that about August, 1899, the grantors had conveyed a number of lots, and had in each deed released all the restrictions; and that at or about this time, the defendant had an interview with the grantors' attorney, by whom the deeds of these lots and of all others sold previously had been prepared. The master states that the tenor of this interview was in some dispute, but that it substantially appeared that the defendant then received an assurance from the attorney that, so far as the grantors were concerned, the restrictions would not be insisted upon, and probably also not by the other grantees.

We are of opinion that the master rightly ruled that, while the grantors could waive their own right to enforce restrictions, they could not derogate from the equitable easement to enforce restrictions, which vested in the plaintiffs at the date of their deeds.

The master was of opinion that considering the short time the restrictions were to run, and the other facts in the case, the plaintiffs might be compensated in damages. The case was then recommitted to the master to report the damages sustained by the plaintiffs respectively. A report to this effect was made accordingly, to which no exceptions were taken. The Superior Court entered a final decree for the plaintiffs for the sums so found due them; and the defendant appealed to this court.

As there is nothing open to the defendant on this branch of the case, and as we have already disposed of the questions which arise on the master's first report, the entry must be

Decree affirmed, with costs.

**HALLWOOD CASH REGISTER COMPANY vs. FRED S. LUFKIN
& another.**

Suffolk. January 7, 1901. — May 24, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

Sale, Rescission.

The defendant in Gloucester gave to a salesman of the plaintiff, a corporation having a cash register factory in Ohio, a written order to ship to him one of the plaintiff's No. 14 cash registers as soon as possible, and agreed "on the fulfillment of the above" to pay \$180, ten dollars in cash and the remainder in twelve notes for ten dollars each payable in successive months. The title was not to pass until the last payment was made. The plaintiff's Boston agent wrote to the defendant "This register will be shipped you as soon as received from the factory." Six days after this and eight days after the original order, the plaintiff's salesman delivered to the defendant one of the No. 14 cash registers, whereupon the defendant paid \$10 in cash and gave twelve notes for \$10 each as agreed. Three days later the defendant returned the register with a letter stating that it was not what he had ordered, which was true, and demanding the return of his money and notes, and bought elsewhere a cash register of another make. The plaintiff by letter then acknowledged that the register was sent by a mistake and added "This error we will correct in a few days." Whereupon the defendant refused to receive any register from the plaintiff and demanded the cancellation

of the order and the return of the money and notes. Thereafter the plaintiff tendered to the defendant and the defendant refused to receive a register in all respects in accordance with the order. The plaintiff retained the money and notes, and sued the defendant in contract, alleging that default had been made on one or more of the notes whereby all of them had become due. At the trial by a judge without a jury, the plaintiff contended that the first delivery was intended by the plaintiff as a loan for temporary use until the register ordered could be made at its factory and shipped. The judge found that, whether the first delivery was intended as a loan or not, the defendant did not so understand it but supposed the register was delivered in performance of the order, and, upon ascertaining that it was not such a machine as he had ordered, was justified in returning it and supplying his need elsewhere, and ruled, that the plaintiff did not have the right to compel the defendant to take and pay for the machine tendered later, and found for the defendant. *Held*, that this ruling was correct and the finding justified by the facts, and that, even upon the plaintiff's theory, it had no right upon the first delivery, which by its own account was either a mistake or a temporary loan, to receive the money and notes, and ought to have returned them upon request, and, if the defendant was liable at all for his refusal to receive the machine tendered later, his liability would be for a breach of the agreement to purchase, and not upon the notes which were without consideration.

BARKER, J. The factory and the main office of the plaintiff is in Columbus, Ohio. The defendants' place of business is in Gloucester, Massachusetts. On April 18, 1899, in Gloucester, the defendants gave to the plaintiff's salesman a written order to ship one of its No. 14 cash registers to them at their place of business as soon as possible, by which order they agreed, "on the fulfilment of the above, . . . to pay . . . one hundred and thirty dollars, . . . ten dollars down and ten dollars each month until paid for. . . . Notes for the balance payable monthly." On April 20, the plaintiff, by its New England agent, wrote from Boston to the defendants acknowledging the receipt of the order, and saying "This register will be shipped you as soon as received from the factory." On April 26, the plaintiff's salesman delivered to the defendants at their place of business one of the No. 14 cash registers, whereupon in payment therefor the defendants gave \$10 in cash and twelve promissory notes for \$10 each.

On April 29, the defendants discovered that the register was not such as their order designated, returned it to the plaintiff's Boston office, with a letter stating that it was not what they ordered and that they therefore returned it and asked for the return of their notes and of the \$10 paid in cash. To this letter the plaintiff replied on May 1, from Boston, acknowledging that

the register sent was a mistake, and adding "This error we will correct in a few days." The defendants replied on May 2, stating that they would not accept any register that the plaintiff should send, and asking the plaintiff to cancel the order and return the \$10 and the notes. The plaintiff sent no reply to this letter. It did receive and sell the register returned to it on April 29. On May 8, it wrote from Boston to the defendants "We will furnish you the register according to the terms of the contract. . . . Under the circumstances we will not accept any countermand, and shall live up to our contract and insist that you live up to yours." To this letter the defendants made no reply. Before receiving information that the delivery of the first register was a mistake and after discovering that it was not in accordance with their order, they had bought a cash register of another make, which seems to have been one of the circumstances referred to in the plaintiff's letter of May 8. On May 24, the plaintiff tendered to the defendants, and they refused to receive, a register which was in all respects according to the order, the tender being made immediately upon the arrival of the register from Columbus. The plaintiff retained the \$10 and the notes and brought this suit on July 26, having written the defendants on June 7 that it should enforce payment of the notes as they should mature. The declaration sets out the order, alleges that the plaintiff has done all that it was bound to do under the order, sets out copies of the notes, alleges that the defendants made them to the plaintiff in accordance with the contract contained in the order, that default has been made in the payment of one or more of them whereby all have become due, and that the defendants owe the plaintiff the amount of all the notes.

The case was tried without a jury. At the trial the plaintiff claimed that the register delivered on April 26 was intended by the plaintiff only as a loan for temporary use, until one could be made at its factory and shipped. The court found as facts that whether the register first delivered was intended by the plaintiff as a loan or not, the defendants did not understand that it was a loan, but on the contrary supposed it was delivered in performance of the order, and that they paid the \$10 and gave the notes in suit for that register at the time of its delivery, in

performance of their contract, and that there was no consideration for the notes, apart from the contract, and also that before receiving notice of the plaintiff's mistake the defendants purchased a register of another make.

The court then ruled that under the facts found the plaintiff did not have the right to compel the defendants to take and pay for the machine tendered on May 24, and found for the defendants.

The only exception is to the ruling that under the facts found the plaintiff did not have the right to compel the defendants to take and pay for the register delivered on May 24.

The plaintiff contends that the ruling was wrong because the case is one in which a vendor having delivered by mistake an article not in accordance with the order, and that article having been rejected and returned by the purchaser upon ascertaining that it did not meet the vendor's contract, the latter could and did thereafter tender the article ordered within a time under which such tender could be made rightfully. In support of this contention the plaintiff's counsel cites *Borrowman v. Free*, 48 L. J. Q. B. (N. S.) 65, *Tetley v. Shand*, 20 W. R. 206, and Benjamin, Sales, (7th Am. ed.) § 697. But in the present case neither the order, which begins "Please ship to us," nor the plaintiff's letter acknowledging the receipt of the order and saying "This register will be shipped you as soon as received from the factory" import that the machine was expected to be built by the plaintiff after the acceptance of the order. Twenty-four hours would be enough time for the order to reach the factory at Columbus, and the interval which elapsed between the date of the plaintiff's letter of April 20 and the delivery of the register on April 26 was ample to forward such a machine from Columbus to Gloucester.

The court therefore well could find that the defendants were justified in supposing that the register delivered on April 26 was intended by the plaintiff as its compliance with their order, and that upon ascertaining that it was not such a machine as they had ordered they were justified in returning it and in supplying their need elsewhere. Thereafter there was no question of seasonableness of delivery. The ruling was right.

Besides this the ruling was upon a question which did not

arise upon the pleadings as they stood. Under the contract between the parties the plaintiff upon its own theory of the case had no right to the defendants' money or notes upon the delivery of April 26, which upon its own account of the transaction was either a mistake on its part, or a temporary loan of a register. It ought therefore to have returned the money and the notes upon request. Its only right of action, if any, arose upon May 24, and was not upon the notes but upon the defendants' agreement to pay contained in their order. The declaration does not allege a breach of that agreement, but is in substance upon the notes, for default in their payment, and it would have been enough for the court to justify its finding for the defendants, to find as a fact that the notes were without consideration.

It may be well enough to add that by the terms of the order the register ordered was not to become the property of the defendants until fully paid for, and that the notes to be given were not to be payment. See *Smith v. Edwards*, 156 Mass. 221.

Exceptions overruled.

A. F. Means, for the plaintiff.

L. S. Simonds, for the defendants.

RICHARD T. GREEN & another, trustees, *vs.* CITY OF
EVERETT.

Middlesex. January 8, 1901. — May 24, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

Municipal Corporations, Powers of City Council of Everett. *Land Damages*, Evidence of value.

Section 28 of the charter of Everett, St. 1892, c. 855, gives the city council of that city the power to lay out and widen streets. *Semble*, that under this power the city council, in taking land to widen a street, could by a vote accepting a proposal in writing make an agreement under St. 1884, c. 226, with the owner of land taken, that the city should abate the betterments to be assessed upon the remainder of such owner's land upon a reduction of his claim for damages for land taken, notwithstanding §§ 21, 26 and 33 of the charter providing, that the city council shall take no part in the executive business of the city, that all the

executive powers of the city shall be vested in the mayor, and that no liability shall be incurred by or in behalf of the city until the city council has voted an appropriation sufficient to meet it. These provisions were passed *alio intuitu* and do not limit the powers of the city council to lay out, alter or widen ways under general laws.

Under the charter of Everett, St. 1892, c. 855, the city council has no power to make an agreement of settlement of a pending petition for damages for land taken to widen a street under the betterment acts, where at the time of the taking no agreement was made under St. 1884, c. 228, and therefore a vote of the city council accepting a proposal of such an agreement of settlement is void and cannot be put in evidence by a petitioner for damages to show the value of his land taken for the widening.

Upon a petition for damages for land taken to widen a street under the betterment acts, the petitioner cannot show the amount of the betterments assessed upon his remaining land, the increase in value from the widening having no bearing on the value of the petitioner's land before the taking.

PETITION against the city of Everett for an assessment, under the provisions of Pub. Sts. c. 51, of the damages sustained by the petitioners by the widening of Ferry Street in Everett, and the taking of certain portions of their land for that purpose, filed August 31, 1898.

At the trial in the Superior Court, before *Hardy, J.*, it appeared, that the petitioners were the owners of three large tracts of land at the junction of Broadway and Ferry Street in Everett, consisting of the westerly, northerly and easterly corners. The taking was made September 21, 1897, pursuant to the betterment acts.

The petitioners' evidence tended to show that the damages sustained by the taking of the land and buildings, and consequent damage to the remaining land, amounted to \$12,000 or more. The respondent's evidence tended to show that the damages amounted to \$7,000 or less.

The petitioners offered to show by evidence, to the form of which no objection was taken, that on April 25, 1899, the city council of Everett accepted a proposal of the petitioners to settle their claim against the city for the takings for the sum of \$7,800, with an agreement to abate the betterments then to be assessed upon their property, and that this agreement was passed over the mayor's veto by the board of aldermen May 8, 1899, and by the common council June 18, 1899; that the petitioners had been willing and offered to settle according to this agreement, but that the city government had neglected

and refused to make the appropriation necessary to carry it into effect. This evidence was excluded, and the petitioners excepted.

The petitioners offered to show by evidence, to the form of which no objection was taken, that on September 18, 1899, betterments to the amount of \$4,232.04 were assessed upon the petitioners' land. Upon the respondent's objection this evidence was excluded, and the petitioners excepted.

The jury returned a verdict for the petitioners in the sum of \$7,599.90; and the petitioners alleged exceptions.

St. 1892, c. 355, is the charter of the city of Everett. The material sections are as follows:

"Section 23. The city council shall, subject always to the approval of the mayor, have exclusive authority and power to order the laying out, locating anew and discontinuing of and the making of specific repairs in all streets and ways and all highways within the limits of the city; to assess the damages sustained thereby by any person and, except as herein otherwise provided, to act in matters relating to such laying out, locating anew, altering, discontinuing or repairing, but in all such matters action shall first be taken by the board of aldermen. Any person aggrieved by the action of the city council hereunder shall have all the rights and privileges now by law in similar cases allowed in appeals from decisions of selectmen."

"Section 21. Neither the city council nor either branch thereof, nor any committee or member thereof, shall directly or indirectly take part in the employment of labor, the expenditure of public money, the making of contracts, the purchase of materials or supplies, the construction, alteration or repair of any public works or other property, or in the care, custody or management of the same, or in general in the conduct of the executive or administrative business of the city, except as herein required in providing for the appointment and removal of subordinate officers and assistants, and as may be necessary for defraying the contingent and incidental expenses of the city council or of either branch thereof."

"Section 26. The mayor shall be the chief executive officer of the city, and the executive powers of the city shall be vested in him and be exercised by him either personally or through

the several officers and boards in their respective departments, under his general supervision and control."

"Section 33. No sum appropriated for a specific purpose shall be expended for any other purpose, and no expenditure shall be made and no liability incurred by or in behalf of the city until the city council has duly voted an appropriation sufficient to meet such expenditure or liability together with all prior unpaid liabilities which are payable therefrom. . . ."

St. 1884, c. 226, referred to in the opinion, is as follows:

"Whenever the authorities empowered to locate, lay out or construct streets, ways or public parks in a city or town, shall take by purchase or otherwise any land therefor, such authorities may make an agreement in writing with the owner of such land that the city or town shall assume any betterments assessed upon the remainder of such owner's lands or any portion thereof, for such location, laying out and construction, and such agreement shall be binding on such city or town: *provided*, such owner shall, on such terms as may be agreed upon with said authorities, release to the city or town all claims for damages on account of locating, laying out and constructing such street, way or park."

S. J. Elder, for the petitioners.

T. J. Boynton, for the respondent.

BARKER, J. The petitioners concede that incomplete negotiations for settlement of a controversy are not admissible in evidence, but contend that the evidence offered and rejected was of a complete settlement of the controversy agreed to by both parties, and which after it had been agreed upon failed only from the refusal of the respondent to fulfil it. A view of the facts shows that such was not the case.

On September 21, 1897, the petitioners' lands were taken to widen a street, the taking being in proceedings under the betterment acts. In these proceedings the city authorities did not act under the provisions of St. 1884, c. 226, by making a written agreement with the petitioners that the city should assume any betterments to be assessed upon their land, they releasing their claim to damages, upon terms agreed upon between themselves and the authorities acting for the city in taking the land. On the contrary the taking was the usual one under the provisions

of law authorizing the assessment of betterments. It gave to the petitioners a right to damages fixed at the value of their land taken before the widening, and it also gave to the city authorities the power to assess betterments on the land of the petitioners which had not been taken for the widening.

The petitioners filed their petition for damages on August 31, 1898. The city authorities exercised their power of assessing the betterments on September 18, 1899, imposing an assessment of \$4,232.04, on the petitioners' land. Before the making of this assessment, during the period from April 25, 1899, to June 13, 1899, the petitioners made a proposal to the council and board of aldermen to settle their claim for damages for \$7,800 and an agreement to abate the betterments to be assessed upon their property. This proposal was accepted by the council and board of aldermen, and the agreement was passed, over the mayor's veto, by the board of aldermen on May 8, 1899, and by the common council on June 13, 1899. Since that time the petitioners have been willing and have offered to settle according to the agreement, but the city government has neglected and refused to make the appropriation necessary to carry it into effect, and matters were in this state when, upon the hearing of this petition at the March sitting of the year 1900, the petitioners offered to show their proposal and the action of the city government upon it as evidence in support of their contention that their damages by the taking were \$12,000 or more.

By the charter of the city of Everett the power to lay out streets is conferred upon the city council. St. 1892, c. 355, § 23. If the votes which followed the proposal accepted by the common council and board of aldermen on April 25, 1899, had been passed as a part of the taking of the land, they might have constituted an agreement in writing under the provisions of St. 1884, c. 226, § 1, and so been binding upon the city. See *Atkinson v. Newton*, 169 Mass. 240. This would have been so notwithstanding the provisions of the city charter cited by the respondent, with reference to the making of contracts by the city council, making the mayor the chief executive officer of the city, and providing that no liability shall be incurred by or in behalf of the city until the city council has duly voted an appropriation sufficient to meet such liability. St. 1892, c. 355, §§ 21, 26, 33.

These sections were passed *alio intuitu*, and do not limit the powers of the city council in its jurisdiction to lay out, alter or widen ways under general laws.

But the taking of the land having been made without any such written agreement, no power was conferred by St. 1884, c. 226, to make the agreement nearly two years after the taking, and simply by way of settlement of a pending petition for land damages. Whether the proposal and votes constitute as the petitioners contend a completed settlement therefore depends upon the general powers of the city council and the limitations of their powers. One such limitation which disposes of the petitioners' contention is that usually and aside from its power derived from St. 1884, c. 226, which as we have seen cannot be invoked in this case, the city council can incur no liability in behalf of the city unless the council has duly voted an appropriation sufficient to meet the liability. St. 1892, c. 355, § 33. See also § 26, and *Brckett v. Boston*, 157 Mass. 177. Therefore the common council and the board of aldermen had no authority to pass the votes of April 25, May 8, and June 13, 1899, and those votes and the proposal did not constitute a completed settlement, and evidence of them was rejected properly, under the ordinary rule excluding evidence of offers or attempts to compromise pending the litigation.

The other exception is to the exclusion of evidence of the amount of the betterment assessment. If the proposal and votes had been competent, perhaps this evidence would have been necessary to the proper understanding of the whole transaction. The offer and the votes having been rightly excluded no good reason can be urged for sustaining this exception. The issue was simply the value on September 21, 1897, before the taking, of certain lands, then adjoining a street in the city of Everett. No reason can be suggested for any lack of competent evidence upon such a question of value. Neither the value of the land taken nor that of the land assessed was an element in the making of the betterment assessment. If the making of the assessment had involved a valuation either of the land taken or of that assessed or of both, such valuations would be no more valuable for the purposes of such a case as was before the jury, than valuations made in the assessment of ordinary taxes.

Exceptions overruled.

CHARLES MOORE & another vs. NORA DUGAN.

Middlesex. January 8, 1901. — May 24, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

Auditor's Report, Prima facie evidence. Mechanic's Lien, Construction of finding, Unnecessary joinder of assignee as party, Lien for work under a contract substantially but not completely performed, Assignment of contract without novation.

Auditors' reports are made *prima facie* evidence by Pub. Sts. c. 159, § 51, and are therefore always admissible upon matters embraced in the order of appointment.

On a petition to enforce a mechanic's lien, the first issue was "Did the petitioners perform the labor and furnish the materials set forth in the petition under the contract therein set forth?" Upon this issue the jury answered "No," but their answers upon the other issues showed that they meant by this answer merely that the contract had not been fully performed. *Held*, that the answer should be thus interpreted and was no bar to the establishment of the lien.

A builder, who had partly constructed a house under a contract, assigned the contract, and the work thereafter was done by the builder for his assignee. A petition to establish a mechanic's lien was filed in the names of and verified and signed by both the builder and the assignee. The respondent took no objection to the form of the petition except by a request made at the trial to order judgment for the respondent. The judge ordered the lien established in the name of the builder. *Held*, that the respondent was not harmed by the fact that the petition was made in both names, that the respondent's relation to the builder was not changed by the assignment, and, if the assignee ought not to have joined in the petition, his joining was no ground for giving a judgment for the respondent.

On a petition to enforce a mechanic's lien, it appeared by the findings, that a contract for the erection of a building, made by the petitioner with the owner of the land, had been substantially but not completely performed, and also that extra work had been done in connection with the erection of the building at the request of the owner. A request to enter judgment for the respondent was refused. *Held*, that the refusal was right, there being clearly a lien for the extra work, and, also, that the petitioner might establish his lien for the amount due him in equity and good conscience for the benefit conferred by him on the landowner by placing the structure on the land, that the claim was within the language of Pub. Sts. c. 191, § 1, a debt for labor and materials furnished, and that the provisions of § 2 in regard to a lien for labor alone had no effect upon it.

On a petition by two petitioners to enforce a mechanic's lien, it appeared, that the labor and materials for which the lien was claimed were performed and furnished under a written contract between a builder, one of the petitioners, and the respondent; that the work was begun and carried on by the builder up to a certain time, when he assigned his contract to the other petitioner. The assignee employed the builder to complete the contract, and from that date, until work upon the contract ceased, all labor and materials were furnished to the builder by the assignee. *Held*, that the assignment was not a bar to the lien; that as to the respondent, there being no novation, the builder remained the contractor, and

the assignee, in doing or furnishing the work after the assignment, acted under the authority which the contract gave to the builder, so that in effect the builder performed the work, and his lien could be enforced for the benefit of his assignee.

PETITION to enforce a mechanic's lien founded on a building contract between the petitioner Harvey Taylor and the respondent Nora Dugan, which was assigned by Taylor during the progress of the work to the petitioner Charles Moore, the petitioner Taylor joining therein in the interest and for the benefit of Moore, the assignee of the contract, filed May 12, 1899.

In the Superior Court, *Hardy, J.*, directed that the lien be established for the sum of \$836.50, the amount found by the jury in its answers to the issues, as against Nora Dugan and her property described in the petition, in favor of the petitioner Harvey Taylor, for the benefit of the assignee, Charles Moore. The respondent alleged exceptions. The whole case is stated in the opinion of the court.

P. B. Kiernan, for the respondent, submitted the case on a brief.

W. B. Durant, for the petitioners.

BARKEE, J. The labor and materials for which the lien was established for the sum of \$836.50 were performed and furnished under a written contract entered into between the petitioner Taylor and the respondent Dugan on October 10, 1898. The work was begun a week later by Taylor and was carried on by him until February 11, 1899, when he assigned all his right, title and interest in the contract to the petitioner Moore, who employed Taylor to complete the contract, and from that date to March 29, 1899, when work upon the contract ceased, all labor and materials were furnished to Taylor by Moore.

On April 14, 1899, the petitioners joined in making and recording a certificate of the lien, claiming a balance of \$817.62 as due, and alleging that Moore, and Taylor in Moore's behalf, claimed a lien for the said sum due Moore, the contract and the assignment to him both being set out. Moore and Taylor also joined in the petition to enforce the lien, filed May 12, 1899. The petition set up the contract and the assignment to Moore, the completion of the performance by him, employing Taylor, the existence of the lien and the previous steps in its enforcement, Taylor joining in the petition in the interest of and for the benefit of Moore.

The respondent Dugan's answer denied the allegations of the petition and alleged in defence that Taylor had neglected to perform his contract, that work had been improperly done, and that she had been put to expense and trouble because of Taylor's delay, and that nothing was due from her upon the contract.

The case was first heard by an auditor, before whom the respondent objected to the introduction of evidence by the petitioners, and evidence being admitted excepted. Of course such exceptions cannot be argued here, and it does not appear from the record before us whether any motion to recommit or annul the auditor's report was made in the lower court. Issues were tried and found by a jury and one of the two exceptions presented by the bill which is before us was to the admission of the auditor's report in evidence. As such reports are made *prima facie* evidence by the statute, this exception must be overruled. Pub. Sts. c. 159, § 51.

When the issues were framed the parties agreed that all issues of fact arising at the trial and not enumerated in the issues framed should be determined by the court.

The account which is part of the petition charges the respondent Dugan with the contract price of \$3,000, as the first item. Then follow twelve items for extra work.

Upon the issues framed the jury found that the petitioners had furnished the labor and materials set forth in the twelve items, in addition to the labor and materials required by the contract, at the request and by the consent of the respondent Dugan, and that there was due the petitioners therefor the sum of \$35.40, and that there was due the petitioners under the contract the sum of \$801.10; that the petitioners have given just credit for all payments received by them on account of the contract, and on account of the extra labor and materials; that they ceased to furnish labor and materials on March 29, 1899; that the work during the last part of it, which may be from the date of the assignment of February 11, 1899, or from the date when Dugan actually obtained her deed of the land, which is not given, was performed and furnished with the knowledge and consent of Dugan; that the value of the work and materials performed and furnished under the contract after Dugan became the owner of the land was \$1,500; that the work upon

the contract was begun before the deed to Dugan and thereafter was performed continuously until its cessation, with her knowledge and consent, and that the petitioner Taylor made the assignment of the contract to Moore. From these findings we infer, what does not explicitly appear, that when Dugan made the contract for the building of the house she had not acquired title to the land, and that she did acquire title while the work was going forward.

Besides the finding stated, the first issue was, "Did the petitioners perform the labor and furnish the materials set forth in the petition under the contract therein set forth with Nora Dugan," and upon this issue the jury answered "No." But it is clear from the whole record, as is stated in the order of the presiding judge establishing the lien, that this meant only that the contract had not been fully performed, as was conceded at the trial; and that the matter of the assignment was not the foundation of the negative answer. After the trial and the answers of the jury the court established the lien as against Dugan and her property in favor of the petitioner Taylor for the benefit of the assignee the petitioner Moore. At the trial Taylor testified that he had no pecuniary interest in the result of the suit, and that it belonged to Moore from whom he had received his pay in full for all labor and materials furnished and for his own labor. The petitioners conceded at the trial that the contract had not been completely performed, and did not claim the entire contract price, but offered to deduct whatever amount ought in fairness to be deducted for the work not done. The contract price was \$3,000, and the payments credited amounted to \$2,150. There had been a reference to arbitrators under the contract before the filing of the petition to enforce the lien. The only exception save that to evidence, above disposed of, was to a refusal to order judgment for the respondent.

The questions for determination are whether the establishment of the lien is barred, either by the negative answer given by the jury to the first issue, or by Taylor's assignment of his interest in the contract to Moore, and whether the form of the petition is fatal to the establishment of the lien.

As to the latter question, the respondent took no objection to the form of the petition except by the request made at the trial

to order judgment for the respondent. She was not harmed by the fact that the petition was made in the name of and verified and signed by both Taylor and Moore. The order of the court established the lien in the name of Taylor, whose relation to the respondent was not changed by the assignment. If Moore ought not to have joined in the petition his joining was no ground for giving a judgment for the respondent.

As to the negative answer of the jury to the first issue, its effect in connection with their other findings and the finding of the court is merely to show that a contract for the erection of a building, made with the owner of the land, has been substantially although not completely performed, and that the state of affairs is such that the owner is justly indebted to the builder on account of his attempt to perform the contract, and also for extra work done in connection with the erection of the building, at the request and with the consent of the owner. The exception to the refusal to enter judgment for the respondent, must in any event be overruled because there was clearly a lien for the extra work. See *Mulrey v. Barrow*, 11 Allen, 152. But as against an owner who has himself contracted with a builder for the erection of the building there is no reason in our statute, or in the construction put upon it by the courts, for declining to establish a lien for the amount justly due from the owner to the builder.

The builder may establish a lien for the amount due him in equity and good conscience for the benefit conferred by him on the landowner by placing the structure on the land, when his contract made with the owner has been substantially performed, although something called for by the contract may not have been done. The case is within the language of the first section of the statute, a debt "due for labor performed or furnished or for materials furnished and actually used in the erection . . . of a building . . . upon real estate" by virtue of an agreement with the owner. As the lien in such a case is for everything furnished, the labor and materials being upon the same footing, the second section of the statute, originally enacted as St. 1872, c. 318, § 1, has no effect upon it, being intended merely to give a lien for labor in some cases where there was no enforceable lien for both materials and labor. No apportionment of the

general balance due as arising from one feature of the work done rather than another, as from labor rather than from materials, is necessary; but merely the ascertainment of what was due upon a *quantum meruit* for both labor and materials, that is to say, upon the whole work. See *Felton v. Minot*, 7 Allen, 412; *Graves v. Bemis*, 8 Allen, 573; *Mulrey v. Barrow*, 11 Allen, 152; *Gogin v. Walsh*, 124 Mass. 516; *Smith v. Emerson*, 126 Mass. 169, 175; *Childs v. Anderson*, 128 Mass. 108; *Cahill v. Capen*, 147 Mass. 493.

The assignment was not a bar to the establishment of the lien. There was no novation. As to the respondent, Taylor remained the contractor; and Moore in doing or furnishing the work after the assignment acted under the authority which the contract conferred upon Taylor. In effect Taylor performed the work, and his lien could be enforced by him for the benefit of his assignee. See *Busfield v. Wheeler*, 14 Allen, 139; *Williams v. Weinbaum*, 178 Mass. 238.

Exceptions overruled.

ROCHESTER BREWING COMPANY vs. LAWRENCE J. KILLIAN.

Suffolk. January 8, 1901. — May 24, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

Contract, Construction. Evidence, Materiality.

A letter, in which a retail liquor dealer asked a brewing company to erect on the building occupied by him a sign stating it to be the headquarters for the sale of the brewing company's beer, contained the following: "It is, of course, understood that I draw no other domestic lager beer than that brewed by the Rochester Brewing Co. during the period of my present license. I also understand that this sign, as well as all other signs placed on or in the building occupied by me, advertising Rochester beer, remain the property of your company and can be removed by you or them at any time which you may elect. Should you find it necessary at any time, by reason of my not drawing your beer, to remove the special board sign in question, and should objections of any kind be raised by the owners of the building to having said sign torn down, I hereby agree to reimburse you or your company to the amount of the cost of the labor and lumber required in the building of such a sign, and hereby grant you the privilege to obliterate the sign matter by repainting." A postscript added "In reference to my reimbursing your company for the labor and lumber used in the within mentioned sign, I mean to convey the idea that *only* in case I should use the board for

new sign or advertising purposes, that you are then to be reimbursed to the extent of its cost as above stated." The sign having been erected, the dealer, after the expiration of his license for that year, ceased to sell Rochester beer and used the signboard to advertise the beer of another company. *Held*, that the dealer's promise to reimburse the brewing company for the cost of the sign was not contingent on his ceasing to sell their beer within the period of his then existing license, and that the labor mentioned was not limited to the labor of carpenters. *Held, also*, that in an action against the dealer on his promise, evidence offered by him, to show that the sign was of benefit to the brewing company and not to him and that the cost of the sign had been charged off by the company on its account books, rightly was excluded as immaterial.

CONTRACT to recover the cost of lumber and labor required in the building of a board sign for advertising purposes, furnished by the plaintiff under a written contract. Writ dated July 25, 1899.

At the trial in the Superior Court, before *Hopkins, J.*, it appeared, that the defendant was a retail dealer in liquors, and occupied a building on the corner of Columbus Avenue, Church and Tennyson Streets, in Boston, having a lease of the entire building, and it was on the roof of the building that the sign in question was erected. A letter of the defendant containing the alleged contract was put in evidence and read as follows :

"June 23, 1896. W. B. Holloway, Manager, Rochester Brewing Co. Dear Sir, — Believing it to our mutual advantage that a large display sign be erected on top of building now occupied by me, to read 'Headquarters for Rochester Brewing Co.'s Lager Beer,' with this end in view I have been granted permission by the owners of the building to have such a sign erected, and would request that you have a tight board sign placed on roof of building, showing the four sides, to stand erect about fifteen feet, reading as stated above. It is, of course, understood that I draw no other domestic lager beer than that brewed by the Rochester Brewing Co. during the period of my present license. I also understand that this sign, as well as all other signs placed on or in the building occupied by me under the firm name of L. J. Killian & Co., advertising Rochester beer, remain the property of your company and can be removed by you or them at any time which you may elect. Should you find it necessary at any time, by reason of my not drawing your beer, to remove the special board sign in question and should objections of any kind be raised by the owners of the building to

having said sign torn down, I hereby agree to reimburse you or your company to the amount of the cost of the labor and lumber required in the building of such a sign, and hereby grant you the privilege to obliterate the sign matter by repainting. I would thank you to give this matter your immediate attention. Respectfully, L. J. Killian.

"P. S. In reference to my reimbursing your company for the labor and lumber used in the within mentioned sign, I mean to convey the idea that *only* in case I should use the board for new sign or advertising purposes, that you are then to be reimbursed to the extent of its cost as above stated. L. J. Killian."

There was evidence for the plaintiff that it provided a sign of the kind stipulated for in the written contract, and paid for the complete sign, including the paint, \$365; that subsequently in May, 1899, the defendant, being still the lessee of the entire building, but not the occupant of the whole, ceased to purchase beer brewed by the plaintiff company, and began to purchase other beer made by the Harvard Brewing Company, and that some time before the date of the writ the original advertisement on the sign was obliterated and words advertising the Harvard Company's beer were substituted.

The defendant, called as a witness by the plaintiff, testified in substance as follows: That he was the lessee of a building on the corner of Columbus Avenue, Church and Tennyson Streets, upon which the sign in question was erected; that he made arrangements for the sign through one Holloway, who was, at the date of the contract in question, the Boston manager for the plaintiff company; that he signed the contract in suit; that the sign in question was erected on three sides of the building, and that subsequently, during his absence in Europe, between May 31 and July 1, 1899, the words originally on the sign were obliterated and the advertisement of the Harvard Company's beer was painted on; that the Harvard Brewing Company's beer is not the Rochester beer; that during his absence in Europe his brother, Thomas Killian, acted as his agent and representative; that he never had permission from the plaintiff to change the advertisement; that on May 31, 1899, when leaving for Europe, he had not exactly severed his relations with the plaintiff, but had made arrangements to take Harvard beer and expected to

cease to use the Rochester beer ; that he ceased to buy beer from the Rochester Brewing Company about the 27th or 28th of May, but did not stop using it then as he had quite a lot on hand ; that at the same time he began buying Harvard beer, and had continued using Harvard beer down to the present time ; that on the day he left for Europe he had a conversation over the telephone with one Albrecht on behalf of the plaintiff company, in which Albrecht requested that the plaintiff be allowed to take its signs, but the defendant told him he was going away, and asked him to let the matter remain until he returned on the first of July, to which Albrecht agreed ; that the defendant had no conversation with Albrecht since his coming home ; that the first he knew of the new advertisement was seeing the sign from the street when he came back ; that he then saw his brother and had a talk with him about it ; and that he thought he could do anything about the sign he saw fit.

Holloway, called as a witness by the plaintiff, testified on cross-examination, that the sign in question was placed there to advertise the beer of the Rochester Brewing Company. He was then asked the following question by the defendant's counsel : " And it was considered then, was it not, as being a place of value as an advertising place ? "

This was objected to and excluded by the judge, and the defendant's counsel excepted to the exclusion. This evidence was offered to show that the sign was for the benefit of the plaintiff, and was of no benefit to the defendant whatever, and that it was a valuable space for advertising purposes.

At the conclusion of the evidence, the defendant offered to prove, by the witness Holloway, that at the end of the fiscal year of 1896, which was the month of September of that year, the cost of the sign in question was charged off on the plaintiff's books, and that it was no longer considered an asset of the company. This testimony was excluded, and the defendant excepted.

The defendant requested the judge to rule that the question as to whether or not the conditions of the contract were broken by the defendant and complied with by the plaintiff to an extent that would allow the plaintiff to recover, should be left to the jury, and further asked the court to make the following rulings : 1st. That this contract expired the first day of May, 1897, the

license year mentioned therein. 2d. That the plaintiff can recover in this suit only for a breach of the contract during that year. 3d. That the sign in question, by the terms of the contract, became on May 1, 1897, the property of the defendant. 4th. That the defendant, if liable at all, is liable only for the cost of the carpenter's labor and the lumber used in the erection of the sign.

The judge refused to give any of these rulings, but in reference to the fourth request instructed the jury that the plaintiff, if entitled to recover, could recover for the cost of the complete sign, less the cost of the paint stock. The defendant's counsel excepted to this refusal and instruction.

The jury returned a verdict for the plaintiff in the sum of \$341.25; and the defendant alleged exceptions.

J. F. Sweeney, for the defendant, submitted the case on a brief.

G. L. Wilson, for the plaintiff.

BARKER, J. The principal question is upon the construction of the defendant's letter in which he agreed under certain circumstances to reimburse the plaintiff to the amount of the cost of the labor and lumber required in the building of such a sign as that which his letter requested to have placed on the roof. The letter was dated June 23, 1896. One sentence in it says, "It is, of course, understood that I draw no other domestic lager beer than that brewed by the Rochester Brewing Co. during the period of my present license." The defendant contends that this sentence controls the whole contract, and that he was not bound to reimburse the plaintiff unless he ceased to draw the plaintiff's beer during the life of his license, which would of course expire at the end of the next April. But unlike the hiring for a year in *Hopedale Machine Co. v. Entwistle*, 133 Mass. 443, on which the defendant relies, the understanding spoken of in the sentence was not initiated by the letter, and was not the subject of the contract as to the sign. The reference to it is merely incidental, and the language of the whole letter shows that the agreement proposed was not limited to the period of the license. The defendant did not say "If I break my agreement I will reimburse you," and did say that the plaintiff could remove the sign at any time, and that he would reimburse the plaintiff if at any time, by reason of his not drawing the plain-

tiff's beer, the latter should find it necessary to remove the sign. This language looks to the time to which the understanding then in force did not reach, as well as to that which the understanding covered. Nor is the labor mentioned in the proposal limited to the labor of carpenters, as the defendant contends in his fourth request.

The only other exceptions argued upon the defendant's brief except those relating to the construction of his letter, are to the exclusion of evidence offered by him to show that the sign was of benefit to the plaintiff and of no benefit to the defendant, and of evidence offered by him to show that in September, 1896, the cost of the sign was charged off by the plaintiff upon its account books. These matters were immaterial.

Exceptions overruled.

LEMUEL E. DEMELMAN vs. DELOSS M. BRISTOLL.

Suffolk. January 9, 1901. — May 24, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

Writ of Entry, Tenant's compensation for improvements, Tenant's liability for net rental value during occupation. *Practice, Civil*, Double costs.

Under Pub. Sts. c. 173, § 18, giving the tenant in a writ of entry compensation for improvements if he has held the premises under a title which he had reason to believe to be good, a tenant cannot be allowed for improvements made after the bringing of the writ.

Under Pub. Sts. c. 173, § 14, a demandant prevailing is entitled to the net rental value of the premises during the time they are detained by the tenant, including their detention pending the tenant's motion for a new trial.

In this case it was adjudged that the exceptions were frivolous and appeared to have been intended for delay, and double costs were awarded against the tenant from the time when the exceptions were alleged by him, with interest from the same time at the rate of twelve per cent a year upon the damages.

WRIT OF ENTRY, dated January 20, 1894.

No counsel appeared for the tenant.

E. F. McClennen, for the demandant.

BARKER, J. The tenant's title seems to have been founded upon the foreclosure of a forged mortgage purporting to have

been made by the demandant's grantor. The trial was before the Chief Justice of the Superior Court without a jury and resulted in a finding for the demandant in which his damages were assessed in the sum of \$400. Judgment was not at once entered on the finding because of the tenant's motion for a new trial. The tenant made a suggestion of improvements and his claim for compensation for them and the demandant's claim for additional damages on account of the tenant's continued occupation of the premises during the pendency of his motion for a new trial were referred to an assessor, whose report was confirmed and allowed by the court and judgment entered thereon, the tenant excepting. The bill of exceptions was entered in this court and argued for the demandant. The tenant did not argue but obtained leave to file a brief and has filed none. Upon examining his bill of exceptions the only questions which seem to be raised are whether he can be allowed for improvements made after the bringing of the writ of entry, and whether the demandant can have damages for the tenant's continued use of the premises after the finding. The first question is governed by *Harris v. Marblehead*, 10 Gray, 40, which holds that no claim can be made for improvements made during the pendency of the controversy. The assessment included in the finding of the Chief Justice was of damages to the date of the finding. As possession was withheld thereafter pending the tenant's motion for a new trial, it was right to award further damages, in order to charge the tenant with the clear rental value of the premises for the time during which he was in possession thereof. Pub. Sts. c. 178, § 14.

The exceptions are frivolous and appear to have been intended for delay. Double costs are awarded against the tenant from the time when they were alleged, and interest from the same time at the rate of twelve per cent a year upon the damages.

Exceptions overruled.

GEORGE W. MUNROE vs. ABNER T. ARMSTRONG & another.

Norfolk. January 9, 1901. — May 24, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

Conversion, Recoupment of damages. Fixtures. Damages, Remoteness.

In an action of tort for the conversion of articles of plumbing taken from an unfinished house of the plaintiff by a plumber on the failure of the contractor who employed him, it appeared that, after work upon the house had been abandoned by the contractor, the plaintiff caused the house to be completed, and that \$1,500 of the contract price had not been paid by the plaintiff to the contractor. The defendant offered to show, that all the cost of plumbing work done under the plaintiff's direction after he took possession, including the replacing of the articles removed by the defendant, was paid for out of this \$1,500. The evidence was excluded. The defendant contended that the plaintiff by the application of the \$1,500 to the plumbing had recouped his damage from the contractor and could not recover it again. *Held*, that the evidence rightly was excluded. The \$1,500 belonged to the plaintiff and not to the contractor and its application to one purpose or another was immaterial.

Where, as part of the construction of a new house, articles of plumbing are affixed to the structure by a plumber, under a contract to put in the plumbing, they become a part of the realty and cannot be removed by the plumber on the failure of the contractor who employed him.

In an action of tort for the conversion of articles of plumbing taken from a house, which is in process of erection for the purpose of letting it to tenants, the plaintiff may recover the rental value of the house during any period of delay which was caused by the acts of the defendant.

TORT for the alleged conversion of certain articles of plumbing removed by the defendants from a building in process of erection on land of the plaintiff. Writ dated October 21, 1899.

At the trial in the Superior Court, before *Bell, J.*, without a jury, an auditor's report was introduced, by which it appeared that the defendants were plumbers who had made a contract with one *McRae*, the general contractor, to do the plumbing in the plaintiff's building. Before the building was finished *McRae* made an assignment for the benefit of creditors, and was subsequently adjudicated a bankrupt. After his assignment *McRae* did no work upon the building. The defendants, on receiving notice of the assignment, proceeded to remove such of the material put in by them as was not enclosed by any part of the woodwork, leaving such of the material as was enclosed by

walls, ceilings and floors or could not be removed without substantial injury to the building. Besides the plumbing, other items of work remained unfinished in the building, and the plaintiff gave notice in writing to the general contractor and his assignee, of his intention to enter upon and take possession of the premises and complete the building. The plaintiff then took possession, and proceeded to complete the contract, upon which \$1,500 remained unpaid to the general contractor.

The defendants asked for eight rulings. The judge gave the second and refused to give the others, which were as follows:

1. This action for conversion cannot be maintained against the defendants. They removed articles which they had placed upon the premises which were their own property and no title to the articles had passed to the plaintiff.
3. As against the plaintiff there was no conversion of the articles removed by the sub-contractors which they had taken upon the premises in pursuance of their contract with the general contractor, such removal having been made before the building passed into the control of the plaintiff and before the time fixed in the general contract for the completion of the house and before the completion of the sub-contract and the acceptance of the defendants' work.
4. The articles removed by the defendants from the building on the plaintiff's land and described in his declaration never became a part of the realty, and an action for the conversion of them cannot be maintained.
5. The defendants were justified in removing their material, the contractor having been insolvent without their knowledge when their contract was made with him, and he not having paid for any part of their work or material according to the terms of his contract with them, and the removal having been made before the building passed into the control of the owner and before the completion of their contract and the acceptance of their work and without substantial injury to the building in which their material was placed.
6. The plaintiff, by the terms of his contract for the erection and completion of the house, stands in the place of the contractor in the event of the latter's failure to finish the work, and until the completion of the house the plaintiff has no greater rights than the contractor against these defendants.
7. No damages, accruing after the time of the alleged trespass complained of, can be assessed

against the defendants, and loss of rent occurring after the time of the alleged trespass cannot be proved as damages against the defendants. 8. Upon the whole evidence the plaintiff is not entitled to recover.

The judge ruled that the acts of the defendants in removing the plumbing were wrongful and that the plaintiff was entitled to recover, and assessed damages against the defendants in the sum of \$262, with interest from the date of the writ. The defendants alleged exceptions.

J. E. Kelley, for the defendants.

A. W. Putnam, for the plaintiff.

BARKER, J. The plaintiff let the erection of a house upon his land to a contractor who became insolvent and did not complete the house. The defendants were engaged to do the plumbing, by the contractor, and at the time of his failure had put much of the plumbing in place, and had in the house the material for its completion. Thereafter, against the plaintiff's objection they took out from the house their material which had not been attached, and much of the plumbing which had been set, leaving only that part of it which was enclosed by the walls, ceilings and floors of the house and could not be removed without substantial injury to the building.

The suit was referred to an auditor, and after the coming in of his report was heard by a justice who found for the plaintiff, assessing damages in the sum of \$262 with interest. The case is here upon the defendants' exceptions to the exclusion of evidence and to rulings given and refused.

It appeared that the plaintiff caused the house to be completed after work upon it was abandoned by the contractor, and that \$1,500 of the contract price had not been paid by the plaintiff to the contractor. The defendants offered to show that all the expenses of plumbing work done under the plaintiff's direction after he took possession, including the replacing of articles removed by the defendants, were paid out of the \$1,500. The exception to the exclusion of evidence was to the exclusion of this offer, the court ruling that the evidence was immaterial.

In support of the exception the defendants contend that if the cost of replacing the articles wrongly removed was paid

out of the \$1,500 it was in effect a recoupment by the plaintiff of the expense of completing the plumbing, and so the pursuit by him of another remedy than that in tort against the defendants to the full satisfaction of his claim, and a bar to this action.

There is no merit in the contention. The \$1,500 was not the property of the contractor or of his sub-contractors. Its application for one purpose or another was immaterial to the action and the evidence was rejected properly.

The court ruled in favor of the defendants that the delivery of material upon the premises by the defendants did not pass the title in it to the plaintiff, but ruled, against the defendants' contention that the articles of plumbing became part of the realty as soon as they were affixed to the house.

These questions are raised by the exceptions as to rulings given and refused.

The first is whether the articles of plumbing became part of the realty, and so property of the plaintiff as soon as they were affixed to the house. There was but one inference from the evidence, and it was a necessary one, that when as part of the construction of a new house articles of plumbing were affixed to the structure by a plumber under a contract to put in the plumbing, it was the intention of all parties to the transaction that they should become a part of the realty as they should be affixed permanently to the structure.

The second is that the defendants had a right to remove the plumbing because of the failure of the contractor. But no reservation of any such right by the defendants is shown. Even if the contractor had been the owner of the land, no such right would have existed. Whether the contractor was insolvent when he hired the defendants was a question of fact upon which there is no finding in their favor; but whether it were so or not nothing is shown to justify a contention that plumbing set in a house under construction by one who had agreed to do that part of the work of building could be removed by the plumber upon failure of the owner or contractor to pay for the work.

The other question is as to the measure of damages. There was evidence tending to show that the house was erected to be let to tenants, and that it was to be ready for occupancy on

August first and was not in fact ready until September first. The presiding judge ruled that the plaintiff could recover for the rental value of the house for such period as its occupancy was delayed by the acts of the defendants.

The defendants contend that because other items of the work than the plumbing remained unfinished the loss of rent was not caused solely by their act in removing the plumbing, but by delay in other work consequent upon the failure of the employer, and so cannot be recovered of them. The answer is that this was a question of fact with which we have no concern. The ruling was merely that the defendants were answerable for delay caused by their acts. The injury for which allowance in damages was made under the ruling was a natural and direct consequence of the defendants' acts.

Upon this branch of the case the defendants' brief assumes that a ruling was given which the bill of exceptions says was refused, and also that a ruling was given of which the bill contains no statement. We do not know from the bill how the court proceeded in assessing damages, except as indicated in the ruling that the plaintiff could recover for damage to wood work and for delaying the occupancy of the house by tenants. These items taken together at the amounts claimed by the plaintiff were much more than the finding and it must be assumed that in making his assessment the presiding judge proceeded according to law the contrary not being shown.

Exceptions overruled.



JOSEPH L. WHITON, JR., vs. BATCHELDER AND LINCOLN CORPORATION.

Suffolk. January 11, 1901. — May 24, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

Pleading, Form of demurrer. Contract, Construction.

Under Pub. Sts. c. 167, § 12, it is sufficient to allege as a cause of demurrer for a defect of substance, that the declaration does not state a legal cause of action. The words "substantially in accordance with the rules contained in this chapter" need not be added unless the defect relied on is one of form.

The following provision, omitting unessential words, was printed on the back of all the certificates of stock of a certain company: "Should the person to whom this certificate is issued desire to sell any of his shares of stock, he shall cause such shares to be appraised by the directors of this company, which it shall be their duty to do on request, and shall thereupon offer the same to them for the use of the company at such appraised value; and if said directors shall choose to take such shares for the use of the company, such person shall, upon the payment or tender to him of such appraised value thereof, and the dividends due thereon, transfer and assign such share or shares to said company; provided that the said directors shall not be obliged to take such shares at the appraised value aforesaid, unless they shall think it for the interests of the company; and if they shall not, within fifteen days after such shares are offered to them in writing, take the same and pay such person, therefor the price at which the same shall have been appraised, such person shall be at liberty to sell and dispose of the same shares to any person whomsoever." One of the original stockholders requested the directors of the company to appraise his shares under the foregoing provision. They refused to do so, whereupon the stockholder sold his shares at auction and sued the company on its alleged contract to have the shares appraised on such request, alleging that by reason of the refusal of the directors to appraise his shares they had sold for much less than their true value. *Held*, on demurrer, that the defendant had not made the agreement alleged, but that the plaintiff had agreed to cause his shares to be appraised by the directors, and, what the declaration alleged had not been done, was the thing that the plaintiff agreed to be done. *Held, also*, that the purpose of the appraisal was to fix the price to be paid for the stock, if the company should elect to take it, and that the stockholder had no right to an appraisal unless the stock was to be taken for the company.

CONTRACT to recover damages arising from the refusal of the defendant to cause ten shares of the capital stock of the defendant belonging to the plaintiff to be appraised at the plaintiff's request by the defendant's directors in accordance with an agreement printed on the back of the certificates of stock issued by the defendant and expressly agreed to by each of the original stockholders, of whom the plaintiff was one, in signing receipts for their certificates of shares. Writ dated February 19, 1900.

The declaration alleged that upon the defendant's refusal to appraise the shares the plaintiff sold the ten shares at public auction in the stock exchange in Boston, notifying the defendant of the time and place of sale, and received from the sale the sum of \$950, and that by reason of the defendant's breach of its agreement the plaintiff was damaged and lost the difference between the price received for the shares and the fair value thereof, namely, the sum of \$650.

The agreement, printed on the back of the certificates held and sold by the plaintiff, was as follows:

“Should the person to whom this certificate is issued, his executor or administrator, or his assignee, or the grantee or assignee of any of said person's shares sold on execution, desire to sell any of his shares of stock, he shall cause such his shares respectively to be appraised by the directors of this Company, which it shall be their duty to do on request, and shall thereupon offer the same to them for the use of the Company at such appraised value; and if said directors shall choose to take such shares for the use of the Company, such person, executor, administrator or assignee shall, upon the payment or tender to him of such appraised value thereof, and the dividends due thereon, transfer and assign such share or shares to said Company; provided, however, that such appraised value shall be not less than the ‘book value’ of the stock as shown by the books of the company immediately after the last preceding stock-taking of the business, at which stock-taking the good will of the business shall have been reckoned as an asset; and provided, also, that the said directors shall not be obliged to take such shares at the appraised value aforesaid, unless they shall think it for the interests of the Company; and if they shall not, within fifteen days after such shares are offered to them in writing, take the same and pay such person, executor, administrator or assignee therefor the price at which the same shall have been appraised, such person, executor, administrator or assignee shall be at liberty to sell and dispose of the same shares to any person whomsoever.

“It shall be the duty of such executor, administrator, grantee or assignee to offer said shares for appraisal and to be taken by this Company, if the Directors shall so elect, whenever requested by the Treasurer, and no dividends shall be paid or allowed after a failure to comply with such request; provided that such request shall not be made until after the payment of one dividend and the expiration of six months from the death of the owner, or sale as aforesaid; but the offer may be made at any earlier period, if the party shall prefer.

“The Directors shall have power, and it shall be their duty, to sell and dispose of the shares which may be transferred as aforesaid to the Company, whenever, in their judgment, it can be done with safety and advantage to the Company; and in

all sales made by the Directors, under any of the aforesaid provisions, it shall be their duty to sell the shares of [to?] such persons as shall appear to them most likely to insure the success of the business carried on by the Company and to promote confidence in the stability of the Company itself."

The defendant demurred to the declaration as follows:

"And now comes the defendant in the above-entitled cause and demurs to the plaintiff's declaration, and says that said declaration and the matters therein contained in manner and form as the same are set forth, are not sufficient in law for the plaintiff to have his action against the defendant. Wherefore, for want of a sufficient declaration, the defendant prays judgment."

In the Superior Court the demurrer was sustained and judgment ordered for the defendant; and the plaintiff appealed.

J. C. Ivy, for the plaintiff.

W. D. Whitmore, Jr., for the defendant.

BARKER, J. The demurrer alleges that the "declaration and the matters therein contained in manner and form as the same are set forth, are not sufficient in law for the plaintiff to have his action against the defendant." The plaintiff contends that it brings nothing before the court. But it points out that the declaration does not state a legal cause of action, which, where the question is one of substance and not of the form of allegation, is one of the causes of demurrer mentioned in Pub. Sts. c. 167, § 12, cl. 2. It brings that question before the court. The words of the clause cited, "substantially in accordance with the rules contained in this chapter," need not be used if the party demurring relies upon no question of form. *Proctor v. Stone*, 1 Allen, 193, 196. *Chenery v. Holden*, 16 Gray, 125.

The substance of the declaration is that the plaintiff was a stockholder, and that the defendant was bound to him in the terms of the agreement, by which, as the declaration puts it, the corporation promised him that upon request it would cause his shares to be appraised by its board of directors in accordance with the agreement; that being desirous of selling his shares he applied to the defendant to cause the same to be appraised in accordance with the agreement, and that the defendant, disregarding its promise, refused to appraise the shares or to cause

them to be appraised in accordance with the agreement, by reason of which refusal he has lost the difference between the real value of the shares and a lower price at which, for lack of the appraisal, the shares were sold at public auction at the Stock Exchange.

Omitting the words relating to executors, etc., the agreement, so far as is now material, is that should the person to whom the certificate of stock is issued desire to sell any of his shares he shall cause them to be appraised by the directors, "which it shall be their duty to do on request," and shall thereupon offer the same to the directors for the use of the company at such appraised value, and that upon payment or tender to him thereof and of the dividends due, if the directors choose to take the shares for the use of the company, if the appraised value is not less than the book value as defined, he shall transfer the shares to the company; with a further proviso that the directors shall not be obliged to take the shares at the appraisal unless they shall think it for the interests of the company; and if they shall not within fifteen days after the shares are offered to them in writing take and pay for the same, the shareholder shall be at liberty to sell them to any person.

While the declaration alleges that the corporation promised the plaintiff that upon request it would cause his shares to be appraised by its board of directors, such is not the language of the agreement. It provides, on the contrary, that the plaintiff "shall cause such his shares respectively to be appraised by the directors." Assuming that the words "which it shall be their duty to do on request" make it the duty of the directors to make the appraisal, the agreement does not say that the company shall cause them to perform that duty, and does say that the plaintiff shall cause them so to do; nor does the agreement say that the company shall be responsible for the breach of this duty by the directors, in the performance of which, if they act, they are not mere agents of the company, but referees or arbitrators standing between it and the stockholder and acting for one party as much as the other. Reading the agreement as a part of the declaration there is no allegation of a failure by the corporation to perform what the agreement says the corporation shall do. The substance of the allegation is that what the plaintiff agreed to cause to be done has not been done.

Aside from this, it is plain that the object of the agreement taken as a whole, in view of the circumstances and relations of the parties to it when it was entered into, was to enable the company to keep its stock in the ownership of stockholders of its own choosing, and that the office of the appraisal was simply to fix the price at which the stock should be paid for, if the company should elect to take it. It would serve no useful purpose to have an appraisal if the directors should not choose to take the stock for the company, while their refusal to appraise upon request of the stockholder would give him the right to sell to any purchaser.

The fair construction of the whole agreement is that the stockholder had no right to an appraisal unless the stock was to be taken for the company.

Order sustaining demurrer affirmed ; judgment for defendant affirmed.



EMMA O. STANNARD vs. ALBERT J. KINGSBURY.

Middlesex. March 5, 1901. — May 24, 1901.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

Frauds, Statute of, Representations concerning the credit of another. Evidence, Materiality, To show damages in action of deceit.

The requirement by Pub. Sts. c. 78, § 4, of a writing, to charge one upon a representation concerning the character or credit of another, applies only when the purpose of the representation is to enable the person recommended to obtain credit, money or goods.

An action can be maintained for oral misrepresentations made by an investment broker concerning the credit of a certain investment association in order to induce the plaintiff to place a sum of money in the defendant's hands for investment.

In an action for false representations of the defendant whereby the plaintiff was induced to place \$5,000 in the defendant's hands for investment, it appeared, that the plaintiff intrusted the sum named to the defendant for investment and thereafter received from him certificates purporting to represent shares in an investment association. The plaintiff was allowed to testify that she received \$20 in July, \$100 in October and \$100 the next January on her investment, and nothing more; also that she had endeavored in every manner to realize on her investment, by way of collection, without success. She was also allowed to testify, that thereafter the defendant advised her to employ a New

York lawyer to compel one S. to return to her her money, this evidence being admitted to show an admission by the defendant as to the value of the certificates. *Held*, that, on the question of damages, it was competent for the plaintiff to show what she had paid the defendant and what she had received in return, and that the admission of the defendant was competent on the question of the value of the certificates.

TORT for false representations alleged to have been made by the defendant, an investment broker, to the plaintiff, a woman without knowledge of business, whereby the plaintiff was induced to place \$5,000, her whole property, in the hands of the defendant for investment. Writ dated December 15, 1899.

At the trial in the Superior Court, before *Maynard, J.*, it appeared, that the plaintiff, in June, 1898, was a single woman residing in Medford, and that the defendant was a dealer and broker in real estate, mortgages and investments, residing in Lowell and having his office in Boston.

The plaintiff testified, on direct examination, that before June 15, 1898, she went to the defendant and told him she had been told he had good investments for money, and asked if he had a safe one for hers. She told him she had \$4,500 on a mortgage in Lawrence, which the debtor wished to take up, and she should have the money, and it was all she had; that some conversation ensued regarding a mortgage on real estate in Reading Highlands into which he thought he could put her money to advantage, but the man must have \$5,000; that she said she thought, if necessary, she could borrow \$500 more, and on his statement that it was necessary, she did borrow the additional \$500; that later the defendant reported the mortgage was undesirable but said he would let her know of something as soon as possible, and still later sent word that he wished to talk with her about another investment which he considered very good indeed, and much better than the mortgage. Subject to the defendant's objection and exception, she was allowed to testify that she called on him about June 15, 1898, when he told her that there was this company, the American Investors Company, but that they formed branch companies through Massachusetts, and that there was one in Boston at that time doing a very good business, which was in charge of a Mr. Burlingame, and that he had one in Lowell which was called the Lowell Rent Purchase Society; that the Lowell Society had recently been incorporated; that he had put consid-

erable of his own time into organizing it and was to be its president and one of the charter members; that the Lowell Society was starting well and doing a good business; that it was perfectly safe, as safe as the Bank of England; that he had put considerable money into it himself; that he understood the best men in Lowell were in it; that if she put her money into it, he, the defendant, would have charge of and be responsible for her money; and that the money would be invested in a mortgage in Lowell.

The defendant excepted to the admission of this testimony on the ground that the representations therein alleged to have been made were representations made by him concerning the character, conduct, credit, ability, trade or dealings of another person within the meaning of Pub. Sts. c. 78, § 4, with the intent to enable that person to obtain credit, money or goods by means of them.

The plaintiff further testified on her direct examination that the conversation on June 15 ended by her saying that she would think the matter over and let the defendant know of her decision later; and that her next meeting with the defendant was on June 22, 1898, when she called at his office and told him she had decided to put her money into his investment.

The plaintiff was allowed, subject to the defendant's objection and exception, to testify that the defendant at this latter meeting repeated his statement that the investment was safe as the Bank of England. The defendant excepted to the admission of this testimony on the ground that it came within the prohibition of Pub. Sts. c. 78, § 4.

The plaintiff testified that the defendant at this latter meeting, after she had told him of her decision, introduced her to Mr. Burlingame, in order, as he said, that the latter might explain to her something about the rate of interest to be paid upon the investment, concerning which he, Burlingame, was better informed than the defendant.

The plaintiff was allowed, subject to the defendant's objection and exception, to testify that Burlingame, in the defendant's presence, explained to her that there were two ways of investing her money, one by which she would receive interest at ten per cent on her money, another by which she would receive six per

cent at compound interest; and that the defendant advised her to invest half her money each way. The defendant excepted to the admission of this testimony on the ground that it came within the prohibition of Pub. Sts. c. 78, § 4.

The plaintiff testified that she gave the defendant her check on that day for \$5,000, payable to the order of the defendant, and that before she signed her check she said to him, "Of course I don't know this Mr. Burlingame, he has nothing to do with my money," and the defendant said, "No."

A receipt was introduced which was sent by the defendant to the plaintiff a few days later, which was signed by the defendant and read as follows: "Received of Miss E. O. Stannard five thousand (\$5,000) dollars. To be invested in full paid stock of the American Investors Company of New York, as per applications signed and forwarded to N. York this day."

Later the plaintiff received through the defendant fifteen certificates, five for \$500 each and ten for \$250 each, all purporting to be certificates of the American Investors Company as general agent for the Lowell Rent Purchase Society, Lowell, Mass.

Each of the \$500 certificates contained the following statement: "Miss Emma O. Stannard is accepted as a member, and is entitled to a \$500 certificate of five shares in the Rent Purchase Fund of the Lowell Rent Purchase Society transferable only on the books of the Society, in person or by attorney, on surrender of this certificate." On the back of each certificate was the following: "The American Investors Company of Providence, Rhode Island, as General Agent for The Lowell Rent Purchase Society of Lowell, Mass. M Emma O. Stannard, 11 Central Avenue, Medford, Mass. R. P. Fund." Then followed a statement of the conditions upon which the certificate was issued. The \$250 certificates were substantially in the same form.

The plaintiff was allowed, subject to the defendant's objection and exception, to testify that one day after June 21 she met the defendant again and asked him what had been done with her money, and that he replied it had been placed in a mortgage in Lowell. The defendant excepted to the admission of this testimony, first on the ground that it came within the prohibition of Pub. Sts. c. 78, § 4, and second on the ground that the statement therein alleged to have been made by the defendant was imma-

terial. The judge admitted the evidence as throwing light upon the nature of the original transaction only.

The plaintiff was allowed, subject to the defendant's objection and exception, to testify that she met the defendant again in May, 1899, and told him she had read in the newspapers that the American Investors Company was in trouble; that she asked him if the Lowell Rent Purchase Society would be affected; and he replied it would not, and, if she did not receive her interest in July owing to the trouble, he and Burlingame would feel they should make it up, as it would simply be a temporary trouble from which the American Investors Company would right itself. The defendant excepted to the admission of this testimony on two grounds, first that it was immaterial, second that it was incompetent as bearing upon the value or worthlessness of the certificates. The judge, however, admitted the evidence without making any qualification at the time as to the purposes for which the jury should consider it.

The plaintiff was allowed, subject to the defendant's objection and exception, to testify that the defendant always, both before and after June 22, 1898, told her that he had put money into the Lowell Rent Purchase Society, until at an interview a year or so afterwards he said "she misunderstood him; that he did n't mean he put money in, put a large amount of money, or put any money in; that he did put a great deal of time and money in that way into it." The defendant excepted to the admission of this evidence on the grounds already stated.

The plaintiff was allowed, subject to the defendant's objection and exception to testify, for the purpose of showing damages, that she received \$20 in July, 1898, \$100 in October, 1898, and \$100 in January, 1899, on her investment and nothing more; also that she had endeavored in every manner to realize on her investment by way of collection without success. The plaintiff was allowed, subject to the defendant's objection and exception, to testify that in April, 1899, the defendant advised her to employ a New York lawyer, who would compel one Stewart, an officer of the American Investors Company, to return her her money. The judge admitted the evidence as tending to show an admission by the defendant as to the value of the certificates.

The plaintiff, on cross-examination, testified that upon receiv-

ing the receipt above mentioned she questioned the defendant why the stock therein specified was not called stock of the Lowell Rent Purchase Society; and that he replied it was merely a matter of form and her money was really in the Lowell Rent Purchase Society.

The defendant introduced in evidence the application signed by the plaintiff addressed to the "American Investors Company, Financial Agents."

The plaintiff, on cross-examination, testified that she could not say whether these papers were all filled out before she signed them, but knew that "Lowell" as the place of signing was not then written there. She admitted her signature, and that she read the papers over before signing them, and that she supposed, at that time, that she understood their contents; but added that, so far as these applications contained any agreement that the American Investors Company should be the financial agent of the Lowell Rent Purchase Society, the defendant told her before she put in her money that he was to be the financial agent. "He said that he would have the charge of my money, because he was the one who had charge of the money put into the Lowell Rent Purchase Society. . . . He would have charge of my money. I said to him, distinctly, I don't know Dr. Willoughby; I don't know anyone else. I knew nothing of the American Investors Company. I never saw Mr. Stewart, he (the defendant) was the one sole one."

It appeared in evidence that the Lowell Rent Purchase Society was never incorporated; but that the American Investors Company, on June 22, 1898, was a corporation under the laws of the State of Rhode Island.

There was evidence that no conveyances of real estate were made to or by the Lowell Rent Purchase Society; and that the only conveyances made to or by the American Investors Company from 1895 to the time of the trial, recorded in the registries of deeds for Middlesex and Suffolk Counties, were a mortgage of property in Lowell, from one Hallowell, father-in-law of the defendant, to the company, made December 20, 1898, and subsequently assigned to G. P. Stewart; and a mortgage of property in Suffolk County, made by Estelle H. Burlingame, wife of E. E. Burlingame, to the company, October 14, 1898, subsequently assigned to Stewart.

• There was testimony of the defendant and of Burlingame contradicting the testimony of the plaintiff.

At the close of all the evidence, the defendant requested the judge to rule that on all the evidence in the case the plaintiff was not entitled to recover, because of Pub. Sts. c. 78, § 4, and to direct a verdict for the defendant. The judge refused so to rule, and submitted the case to the jury, and the defendant excepted. The material portions of the judge's charge and the defendant's exceptions thereto are stated in the opinion of the court.

The jury returned a verdict for the plaintiff in the sum of \$5,747.50; and the defendant alleged exceptions.

J. C. Burke, for the defendant.

S. J. Elder & W. C. Wait, for the plaintiff.

LATHROP, J. While there are many exceptions in this case, most of them depend upon the question whether the Pub. Sts. c. 78, § 4, apply to the facts which are disclosed by the plaintiff's testimony, or which the jury might have found to be the facts, if they believed the plaintiff's testimony rather than the evidence for the defendant. The statute in question was first passed in this Commonwealth in 1834, and has been in force ever since. St. 1834, c. 182, § 5. Rev. Sts. c. 74, § 3. Gen. Sts. c. 105, § 4. It appears in the Pub. Sts. c. 78, § 4, in these words: "No action shall be brought to charge a person upon or by reason of a representation or assurance made concerning the character, conduct, credit, ability, trade, or dealings of any other person, unless such representation or assurance is made in writing and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized."

The St. of 1834, contained the words "to the intent or purpose that such person may obtain credit, money or goods thereupon." These words were omitted in the Revised Statutes and the subsequent revisions; but it has always been held that the statute was to be construed as if these words still remained; and that the statute does not apply unless the intent or purpose of the representation is to enable a third person to obtain credit, money or goods by means of it. *Medbury v. Watson*, 6 Met. 246, 249. *Norton v. Huxley*, 13 Gray, 285, 287. *Belcher v. Costello*, 122 Mass. 189.

In the case at bar, the declaration does not proceed upon the ground that the false representations were made to enable the Lowell Rent Purchase Society to obtain the plaintiff's money, but upon the ground that they were made to induce the plaintiff to place the sum of \$5,000 in the defendant's hands for investment. This distinction was carefully pointed out by the judge in his charge to the jury; and it was for the jury to say on all the evidence which view was correct.

The case of *Wells v. Prince*, 15 Gray, 562, relied upon by the defendant, is distinguishable from the case at bar by the fact that the representations alleged and relied upon in that case were made with the intent of inducing the plaintiffs to make a contract of insurance with a certain insurance company, so that the insurance company might obtain the money of the plaintiffs, as the premium for such insurance.

Another exception to the charge of the judge relates to the misrepresentation concerning the Lowell Rent Purchase Society, to the effect that it had been recently incorporated. It was admitted that there was no such corporation, but there was evidence that it was a voluntary association, though the testimony on this point was very indefinite, and it was a disputed question whether there was any voluntary society on June 22, when the plaintiff paid her money. The judge instructed the jury that the statute applied not only to an individual but to a corporation or to a society; that the statute did not apply to a thing which did not exist. This was repeated in several forms. The judge then said: "But a thing which does not exist, whether it was something represented as a person or a corporation or a society, if such a thing was not in existence, no such person in existence, no such organization in existence, of course it [the statute] cannot apply to it. . . . So that if the jury should find that no such corporation existed as the Lowell Rent Purchase Society, or did not exist at the time that the money was borrowed, an action may be brought to charge the defendant, in spite of this section of the statute, that is, would not preclude an action being brought for it." We are of opinion that taking this portion of the charge as a whole the judge did not intend to use the word "corporation" as meaning exclusively an incorporated body, and that the jury could not have been misled by what was said. If, however,

a different construction is to be adopted, and the word "corporation" is to be limited to an incorporated body, we are still of opinion that the defendant has no ground of exception. According to the testimony of the plaintiff the representation was that the Lowell Society had recently been incorporated. This it was admitted was false.

The remaining exception relates to the admission of evidence on the question of damages. The plaintiff was allowed to testify that she received \$20 in July, \$100 in October, and \$100 the next January on her investment, and nothing more; also that she had endeavored in every manner to realize on her investment, by way of collection, without success. She was also allowed to testify, that in April, 1899, the defendant advised her to employ a New York lawyer to compel one Stewart to return to her her money. This evidence was admitted as tending to show an admission by the defendant as to the value of the certificates.

There is nothing in the bill of exceptions to show that any request was made by the defendant in respect to the measure of damages, or what the ruling of the judge was upon this point, although the exceptions state at the end of the part of the charge which is given: "The foregoing is all of the charge which is material to the issues raised by this bill of exceptions." It must be assumed therefore that proper instructions were given on this point. It was clearly competent for the plaintiff to show what she had paid the defendant, and what she had received in return. The question of the value of the certificates does not rest alone upon the evidence objected to, but upon other evidence of admissions of the defendant; and that which was objected to was competent on the question of value.

Exceptions overruled.

FRANK M. PERRY vs. BENJAMIN LANCY.

Suffolk. March 5, 6, 1901. — May 24, 1901.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

Writ of Entry, Seisin of tenant. Tax, Sale, Redemption.

A deed under a valid tax sale passes a paramount and new title, and a seisin from the moment of conveyance.

A conveyance, on foreclosure sale, of land that has been sold for taxes and is in possession of the purchaser at the tax sale, although under St. 1891, c. 354, it passes the rights of entry and of action, does not disseise the holder of the tax title.

In case of a conveyance under a tax sale it will be presumed that possession followed the tax title, especially in the case of marsh land probably not occupied by any one.

If a tender to redeem from a tax sale under St. 1888, c. 890, § 57, has been prevented by the conduct of the holder of the tax title in wilfully and successfully eluding a mortgagee of record having the right to redeem, who has been searching for him for the purpose of paying him and has written to him repeatedly offering to pay, the mortgagee is in the same position, as against the person eluding him, as if the tender had actually been made, and if his attempt to make the tender was made in good faith within two years after he had actual notice of the sale, the lien is discharged, and he can maintain a writ of entry for the land.

WRIT OF ENTRY to recover a certain parcel of land on Marsh Street in that part of Boston called Dorchester, dated September 13, 1899.

In the Superior Court the case was heard by *Bralej, J.*, on an agreed statement of facts substantially as follows :

The tenant claimed title to the premises by a tax deed duly recorded, and it was agreed that all of the proceedings of the assessment and sale were valid, and that the sale took place on October 12, 1898. The demandant waived all claim to damages.

It was agreed that on January 21, 1897, the demandant was the holder of a recorded mortgage upon the premises, given by Cornelius and Margaret Deasy to Samuel Babcock, dated March 28, 1878, which mortgage had been assigned to the demandant by sundry mesne conveyances duly recorded ; that, on January 21, 1897, the demandant for the first time had actual notice of the existence of the tax title through receiving a postal card,

which read as follows: "55 Richfield Street, Dorchester, January 21. I find you have a mortgage on a piece of marsh land on Marsh Street for \$1,000. The property was sold for tax. I suppose you know of it, but tell me if you want to redeem. I would like to hear from you at once. The mortgage was given as much as twenty years ago, but by different assignments was at last held by you. Benjamin Lancy."

It was further agreed that on March 1, 1898, the demandant foreclosed his mortgage and sold his premises to Walter H. Baldwin, and made a conveyance to Baldwin under the power of sale contained in the mortgage; that on May 17, 1898, Baldwin conveyed the premises, by deed duly recorded, to the demandant; and that on June 7, 1898, the demandant wrote to the tenant as follows: "Benjamin Lancy, Esq., Provincetown, Mass.: Dear Sir, — I wrote you some time ago in regard to redeeming a certain estate from tax title on which I hold a mortgage on estate Glide Street, Dorchester. I have received no reply and have sent to the house twice and could not find you. Will you kindly let me hear from you when I can see you, so that the matter can be settled. Yours respectfully, Frank M. Perry, 194 Washington Street, Boston."

On June 27, 1898, the demandant wrote the tenant as follows: "Mr. Benjamin Lancy: My dear Mr. Lancy, — Your letter received. In reply would say that I did not know that you had paid the intervening taxes. I supposed that they had been paid by the owner of the estate. If you will send me the amount in total that is due you up to a week from to-day, and will have the deed that I sent you executed, I will send you the funds. In regard to your calling here, would say that I sent a messenger to your house with ample funds, four times, to pay any claims that you may have on this estate, but was unable to find you, so that all I could do was to request you to call, which I did. Please advise me as soon as you can the amount due so that I can send a check and close the matter. Yours respectfully, Frank M. Perry."

Thereafter the demandant received from the tenant the following letter: "East Barnard, Vermont. F. M. Perry: I can sell you the marsh land, but you are not entitled to redeem. July 15, 1898. Benj. Lancy."

It was also agreed, that the demandant had not made any conveyance of his title, neither had the tenant made any conveyance of his tax title; that the tenant had had no possession of the premises other than arises by force of law from the existence and holding of his tax title; that the demandant had necessary funds at all times since July 15, 1898, to pay to the tenant all sums paid by him for the tax title, together with interest thereon, and legal costs, and any and all sums paid by the tenant for accruing taxes, with interest; and that the demandant had never made any effort to pay to the city treasurer of Boston any sum which the tenant was entitled to receive under his tax title.

The case was tried without a jury, and it was agreed between the parties, that the judge should determine only the questions whether the writ should abate upon the foregoing facts as to possession, and whether the demandant, on the foregoing facts, had made a tender on July 15, 1898, sufficient to entitle him to a release of the premises from the tax title, or stood in the same position as if he had actually made such a tender or payment; and that if the court should give judgment for the demandant, the demandant should pay the tenant \$175.

The Superior Court gave judgment for the demandant; and the tenant appealed.

W. O. Childs, for the tenant.

G. S. Littlefield, for the demandant.

HOLMES, C. J. This is a writ of entry brought by a party having the rights of a mortgagee of record, *McGauley v. Sullivan*, 174 Mass. 303, against the holder of a tax title, on the ground that his title has been brought to an end. St. 1888, c. 390, § 57. The case is before us upon agreed facts, and it appears that the tenant has had no possession of the premises other than arises by force of law from his tax title. The first defence is based on this fact. The demandant learned of the tax title for the first time on January 21, 1897. It would seem that the tenant resorted to devices which have become familiar to the court through a number of recent cases in order to avoid a redemption until it should be too late. The tax sale took place on October 12, 1893, so that both the two years allowed for redemption by St. 1888, c. 390, § 57, and the five years within which by § 76 a bill in equity can be brought have expired.

Evidently the purpose of this purely technical defence, an afterthought, as appears by the pleadings, is to carry through the trickery by which the demandant is to be deprived of a remedy.

But it is agreed that the sale to the tenant was valid. Therefore the tenant got not only a paramount and new title, but a seisin at the moment of the conveyance. There is nothing which shows as matter of law that he has been disseised since, although the mortgage has been foreclosed and the land conveyed to the demandant. St. 1891, c. 354. It is to be presumed that possession followed the tax title, especially as this seems to have been marsh land and probably not occupied by any one.

The other defence is that there has been no tender sufficient to discharge the lien. § 57. The demandant seems to have made unavailing attempts to find the tenant for the purpose of paying him, and to have written repeatedly. On July 15, 1898, he received a reply dated from East Barnard, Vermont, saying: "You are not entitled to redeem." Since that time the demandant always has been able and, it may be presumed, ready and willing, to pay the amount properly payable to the tenant, and it is agreed that if he recovers now he is to pay a certain sum. We are of opinion that as against the tenant the demandant is entitled to stand in the position of one who has made a tender under § 57, and that the lien is discharged. *Schayer v. Commonwealth Loan Co.* 163 Mass. 322. *Hazard v. Loring*, 10 Cush. 267.

The suggestion that the demandant should have paid the city treasurer and that the statute giving the right of redemption to mortgagees of record is unconstitutional, have been disposed of in earlier decisions. *Barry v. Lancy*, *ante*, 112.

Judgment for demandant.

CHARLES C. DONNELL & others vs. NEWBURYPORT
HOMŒOPATHIC HOSPITAL & others.

Essex. March 6, 7, 1901. — May 24, 1901.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

Devise and Legacy, Construction.

A testator died seised of four parcels of land, leaving a widow, one son and one daughter. One half of one parcel of land, on which was his house, he gave to his son when he should arrive at the age of twenty-one years and gave him the remaining half on the death of the testator's widow. He also gave his son another parcel either outright or on the same terms. The remaining two parcels he gave to his daughter when she should arrive at the age of twenty years. Then followed this clause: "My personal estate to be divided in the manner following after my estate is settled, my wife to have one half, and my two children the remainder in equal shares, if they live to the age of twenty-one years, and if my children should die childless what remains of my estate both real and personal, after the decease of my wife, to descend to the heirs of G. D." Both the son and daughter survived the widow and both died childless after reaching the age of twenty-one years. *Held*, that the contingency intended to be described was the event of the testator's children dying childless before reaching the age of twenty-one years, and that G. D. took nothing.

WRIT OF ENTRY by Charles C. Donnell and others, heirs and next of kin of George Donnell, claiming under the will of Joseph Toppan of Newbury against the Newburyport Homœopathic Hospital, the General Charitable Society of Newburyport, and the Society for the Prevention of Cruelty to Animals of Newburyport and vicinity, residuary devisees and legatees under the will of Ann G. Toppan, daughter of Joseph, dated July 17, 1900.

In the Superior Court, *Pierce, J.*, found for the demandants and ordered judgment entered for them, and the tenants appealed.

The will of Joseph Toppan, omitting the introductory and attesting clauses, was as follows:

"My real estate to be divided in the following manner, the southerly half of the house I now live in, with half the land under and adjoining the same, with the privilege of using the entryway, I give and bequeath to my son Joseph when he shall arrive at the age of twenty-one years and the remaining half to

be his at the decease of my wife. Also the house and land now occupied by Benjn. Colby.

"To my daughter Ann G. I give the brick store, with the land under and adjoining the same now occupied by D. H. Knight, also the lot of land adjoining Hancock and Washington Streets, when she arrives at the age of twenty years.

"My personal estate to be divided in the manner following after my estate is settled, my wife to have one half, and my two children the remainder in equal shares, if they live to the age of twenty-one years, and if my children should die childless what remains of my estate both real and personal, after the decease of my wife, to descend to the heirs of George Donnell."

George Donnell was a nephew of the testator.

All the material facts are stated in the opinion of the court.

H. P. Moulton, for the Newburyport Homœopathic Hospital.

H. I. Bartlett, for the General Charitable Society of Newburyport.

R. G. Dodge, for the Society for the Prevention of Cruelty to Animals in Newburyport.

J. T. Choate, for the demandants.

LATHROP, J. The question in this case is: What property passed by the will of Joseph Toppan to his son Joseph L. and to his daughter Ann G., who, with their mother, the testator's widow, survived him. The son at his father's death was thirteen years old and the daughter eleven. The testator died seised of four parcels of land. He gave one half of one parcel, on which was his house, to his son Joseph when he should arrive at the age of twenty-one years, and the remaining half at the death of the testator's widow. He also gave to his son one other parcel. The remaining parcels he gave to his daughter, when she should arrive at the age of twenty years. Then followed this clause: "My personal estate to be divided in the manner following after my estate is settled, my wife to have one half, and my two children the remainder in equal shares, if they live to the age of twenty-one years, and if my children should die childless what remains of my estate both real and personal, after the decease of my wife, to descend to the heirs of George Donnell."

The testator died in 1842. His widow died in 1850. Joseph

L. Toppan died intestate in 1895, leaving no widow, and as his only next of kin his sister, Ann G. Toppan, who died in 1899, leaving a will by which she devised the land in question to the tenants. Neither the son nor the daughter was ever married.

The claim of the demandants is under the last clause of the will, as the heirs of George Donnell, on the ground that the two children died childless.

We are of opinion, however, that the contention of the demandants is not in accordance with the intention of the testator. He had already disposed of all the real estate subject to two contingencies. His son was to have one half of one lot on reaching the age of twenty-one, and the other half at the decease of the testator's wife. Then follow the words: "Also the house and land now occupied by Benjn. Colby." It can make no difference in this case whether this is to be construed as an absolute devise, or as one upon the same terms as the other. The devise to the daughter was to take effect when she became of the age of twenty. The testator then disposed of his personal property, one half to his widow, and one half to his children if they should live to the age of twenty-one. It then apparently occurred to the testator that if his children died before reaching the age of twenty-one, no provision was made for a portion at least of the real estate, and one half of the personal property. He evidently wished, if one of his children died before that age, leaving a child or children, that such child or children should take the parent's share; and if the children died childless before the age of twenty-one, what remained, as it would go to the widow of the testator, should pass on her death to the heirs of George Donnell, a nephew of the testator.

This is not a case of a devise to A. for life, either with or without a limited power of disposition, with remainder to B., and the case does not fall within the class of cases relied upon by the demandants, namely, *Whitcomb v. Taylor*, 122 Mass. 243, *Hooper v. Bradbury*, 133 Mass. 303, *Welch v. Brimmer*, 169 Mass. 204, and *Dorr v. Johnson*, 170 Mass. 540.

The will is an illiterate one, but the construction which we have adopted favors the early vesting of interests, and is in accordance with the authorities, both in this country and in England. *Hilliard v. Kearney*, Busb. Eq. 221. *Burton v. Conig-*

land, 82 N. C. 99. *Andrews v. Sargent*, 71 Vt. 257. *Phelps v. Bates*, 54 Conn. 11. *Beltzhoover v. Costen*, 7 Barr, 13. *Home v. Pillans*, 2 Myl. & K. 15. *Monteith v. Nicholson*, 2 Keen, 719. *In re Johnson's trusts*, 10 L. T. (N. S.) 455. *In re Hayne's trusts*, 18 L. T. (N. S.) 16. *Clark v. Henry*, L. R. 11 Eq. 222. *In re Dowling's trusts*, L. R. 14 Eq. 463. See also Smith on Executory Interests, in Appendix to Fearn on Cont. Rem. (10th ed.) 347.

It follows that the finding of the judge of the Superior Court in favor of the demandants must be reversed, and judgment should be entered for the tenants.

So ordered.

WILLIAM RILEY vs. ISAAC N. TUCKER.

Suffolk. March 7, 1901. — May 24, 1901.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

Negligence, Ways or works under St. 1887, c. 270, § 1.

In an action under St. 1887, c. 270, § 1, by a plumber's helper against his employer, it appeared, that the defendant was doing the plumbing work of a building in process of construction. There were no stairs in the building, but access from floor to floor was had by means of ladders connecting stagings built in the elevator well on the level of each floor. The plaintiff was injured by one of these stagings giving way when he was upon a ladder resting on it. The defendant had nothing to do with the construction of the stagings. They were built before he began his work and were used by all the workmen of the different contractors. *Held*, that there was no evidence which would warrant a jury in finding that the ladders and stagings formed a part of the ways or works of the defendant within the meaning of the act.

TORT under the employers' liability act, St. 1887, c. 270, for injuries to the plaintiff while in the defendant's employ by reason of alleged defective ways and works of the defendant furnished for doing certain work in the erection of a building at the corner of Brimmer and Pinckney Streets in Boston. Writ in the Municipal Court of the City of Boston dated May 2, 1898.

The case came by appeal to the Superior Court and there was tried before *Dewey, J.*, who ordered a verdict for the de-

fendant. The plaintiff alleged exceptions, which, after the death of *Dewey, J.*, were allowed by *Fessenden, J.* The case is fully stated in the opinion of the court.

P. B. Runyan, for the plaintiff.

J. B. Moran & A. D. Moran, for the defendant.

LATHROP, J. This is an action of tort under the St. of 1887, c. 270, § 1, cl. 1, for injuries sustained by the plaintiff while in the defendant's employ. The case was tried in the Superior Court. At the close of the evidence for the plaintiff, the judge directed a verdict for the defendant; and the case is before us on the plaintiff's exceptions.

The evidence is set forth at length in the bill of exceptions; but so far as it is necessary to this decision it may be summarized thus. The defendant was doing the plumbing work in a new building in process of construction in Boston. The plaintiff was nineteen years old, and was in the employ of the defendant as a plumber's helper. There were no stairs in the building, but there were stagings built in the elevator well on the level of each floor, and access was had from floor to floor by means of ladders. The defendant had nothing to do with the construction of the stagings; and they were built some time before the defendant began his work. They were used by all the workmen of the different contractors. The plaintiff had worked upon several houses before the day of the accident, and knew that the defendant never constructed any staging upon any building upon which he worked, but used the means he found there to go from one floor to another. The plaintiff began work on the building on February 1, 1898, and worked there until the day of the accident, the ninth day of the following April. The accident was caused by a staging giving way while the plaintiff was on a ladder resting thereon.

It is unnecessary to state the evidence bearing upon the question of the plaintiff's due care; or that in relation to the cause of the fall of the staging, as we assume that there was evidence that the plaintiff was in the exercise of due care, and that the staging was insufficiently constructed.

The remaining question in the case is whether there was any evidence that would warrant the jury in finding that the ladders and stagings formed, as alleged in the declaration, a part

of the ways or works of the defendant, within the statute above cited.

We are of opinion that this question must be answered in the negative. The defendant did not construct the stagings, nor did he manage or control them. He had no power to remedy a defect if he discovered it. This question has been so often before the court that we deem further discussion of it unnecessary. See *Lynch v. Allyn*, 160 Mass. 248, 252; *Engel v. New York, Providence, & Boston Railroad*, 160 Mass. 260, and cases cited; *Moynihan v. King's Windsor Cement Co.* 168 Mass. 450.

Exceptions overruled.

HARRY J. JAQUITH, trustee, vs. MARIANNE E. ROGERS.

Middlesex. March 7, 1901. — May 24, 1901.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

Fraud, as against creditors. *Evidence*, Relevancy, Burden of proof. *Practice*, Civil, Rulings and Instructions.

In a real action to recover land conveyed to the tenant through a third person by her husband, on the ground that the conveyance was fraudulent as against creditors, the demandant asked the tenant's husband "How much were you indebted in 1896 at the time of your examination as a poor debtor?" and stated that his offer was, to show that the witness at the time of the examination referred to had no debts other than the claim of the bank represented by the demandant. *Held*, that the question properly was excluded, the fact sought to be proved having no legitimate bearing on the question in issue.

In a real action, by a judgment creditor representing a debt established by a suit in Kansas, to recover land conveyed to the tenant through a third person by her husband, on the ground that the conveyance was fraudulent as against creditors, there was evidence, that at the time of the conveyance the grantor had other property worth several times the amount of the claim of the demandant's predecessor in title, that his other indebtedness was small, that some of his property worth several thousand dollars stood recorded in his name, and that the conveyance was made in pursuance of a promise to his wife, given before the bringing of the original suit in Kansas by the demandant's predecessor, at which time the land stood in the grantor's name and could have been attached here, the demandant's predecessor electing to sue in Kansas and to attach the grantor's real estate there. *Held*, that, on this evidence, a request for a ruling that the demandant was entitled to a verdict as a matter of law rightly was refused, the question of fraud being one not of law but of fact for the jury.

It is not as a matter of law fraudulent as against a creditor, for the owner of certain

land who has no other real estate of sufficient value to satisfy the creditor's claim, but who has other property consisting of stocks, bonds or money in his possession, to convey the land to his wife without informing the creditor of his ownership of the personal property. The law does not compel him to go to his creditor and tell him just what bonds and securities he has. Whether in such a case there was any fraudulent concealment is a question of fact for the jury.

The fact, that the demandant in a real action has made out a case sufficient to entitle him to go to the jury, does not throw the burden of proof upon the tenant.

A judge properly may refuse to give a ruling which requires him to pick out particular facts and instruct the jury as to their effect.

WRIT OF ENTRY to recover land conveyed to the tenant, Marianne E. Rogers, by Edwin B. Rogers, her husband, through conveyances made to and by Emma F. Rogers, her sister, dated August 4, 1898.

At the trial in the Superior Court, before *Gaskill, J.*, it appeared, that the demandant was trustee for the Hancock National Bank, successor by change of name to the Traders National Bank of Boston. The Traders National Bank had a judgment in Kansas against Edwin B. Rogers; and thereafter the Hancock National Bank, its successor by change of name, brought a suit on that judgment in this Commonwealth in which the land demanded was attached. The bank got judgment and the land was sold on execution to the demandant, as trustee for the bank. No question was raised with regard to the regularity of the execution or sale, or the record of the demandant's title thereunder.

Edwin B. Rogers, called by the demandant, testified that after the execution sale of the premises in question he was examined in poor debtor proceedings in the Police Court of Newton, in the year 1898. He also testified: "I conveyed this property to Emma F. Rogers and she to Marianne E. Rogers, my wife. The reason that I conveyed this property was that I promised in 1894 that at her next birthday I would give her this property. Her birthday came the twentieth day of May, I think, 1895. Another reason was that I was perfectly solvent and free from debt, and had a right to do it."

Rogers further testified that he then, at the time of testifying, had no property. The demandant then asked him: "How much were you indebted in 1898 at the time of your examination as a poor debtor?" The tenant objected to this question.

The demandant stated that his offer was to show that Mr. Rogers had no debts in 1898 at the time of his examination other than the claim of the Traders National Bank. This question was excluded by the judge on the ground that it was immaterial, and the demandant excepted to the exclusion of the question and of the facts offered to be proved. All other material evidence is sufficiently described in the opinion.

At the conclusion of the evidence, the demandant asked the judge to give the following rulings:

"1. Upon all the evidence in the case the demandant is entitled to a verdict as a matter of law.

"2. If at the time of the transfer of these premises by Mr. Rogers to Emma F. Rogers, the only other property which he had, sufficient to pay the judgment of the Traders Bank, consisted of stocks, bonds, or money, in his possession, and if he kept all knowledge of them from the bank, he is to be regarded as insolvent, even though these stocks, bonds and money were sufficient to pay all his debts; and in such case the demandant is entitled to recover.

"3. If Edwin B. Rogers, at the time of the transfer of this real estate to Emma F. Rogers, had no other real estate of sufficient value at that time to pay the claim of the Traders Bank, and if his other property consisted of stocks, bonds or money in his possession, and he kept all knowledge of them from the Traders Bank, the conveyance of this real estate would necessarily operate to hinder and delay the bank in the satisfaction of its claim, and the demandant is entitled to recover.

"4. If the premises in question were conveyed by Mr. Rogers to the tenant by a mesne conveyance through Emma F. Rogers, without any valuable consideration therefor, and if he had no other attachable property except stocks, bonds or money in his possession, and all knowledge of them was kept from the bank, and if the Traders Bank had a valid claim against him at the time of that conveyance, these facts would furnish *prima facie* evidence of a fraudulent purpose on his part in making said conveyance; and it is then necessary for the tenant to rebut or control this evidence."

The judge refused to give any of the above rulings, but submitted the case to the jury with instructions, which were set

forth in the bill of exceptions but are not involved in the decision of the court. To the exclusion of the evidence offered as above stated, and to the refusal to give the rulings requested, the demandant alleged exceptions.

The jury returned a verdict for the tenant; and the demandant alleged exceptions.

W. R. Bigelow, for the demandant.

F. H. Williams, for the tenant.

LATHROP, J. The principal question in this case is whether the lot of land sought to be recovered from the tenant was fraudulently conveyed to her by her husband through a third person, on May 24, 1895, with intent to defeat, delay or defraud his creditors. The jury found for the tenant, and the case is before us on one exception to the admission of evidence, and on exceptions to the refusal to give certain rulings requested.

1. The exception to the exclusion of evidence may be briefly disposed of. The tenant's husband, Edwin B. Rogers, was asked by the demandant this question: "How much were you indebted in 1898 at the time of your examination as a poor debtor?" On objection being made, the demandant stated that his offer was to show that Mr. Rogers had no debts in 1898, at the time of his examination, other than the claim of the Traders National Bank. The fact sought to be proved seems to us to have no legitimate bearing upon the question in issue; and the exception must be overruled.

2. The first ruling requested was rightly refused. It could not be said that upon all the evidence in the case the demandant was entitled to a verdict, as matter of law. There was evidence in the case that at the time of the conveyance the grantor had other property several times the amount of the claim of the demandant's predecessor in title, and that his other indebtedness was small; that some of his property, worth several thousand dollars, stood in his name by deeds duly recorded; that the conveyance was made in pursuance of a promise to his wife, given before the commencement of the original suit, at which time the land in controversy stood in his name and could have been attached here, but the bank which the demandant represents elected to sue in Kansas, and to attach his real estate there.

In *Cook v. Holbrook*, 146 Mass. 66, where a conveyance, made

by a father to a trustee for the benefit of the grantor's children, was sought to be set aside, by pre-existing creditors, on the ground of fraud, the case came before this court on an exception to the refusal of the court below to rule that "fraud, in a voluntary conveyance, such as this is shown to be, so far as concerns existing debts, is an inference of law." This court overruled the exceptions, and it was said by Chief Justice Morton: "But the law is well settled in this Commonwealth that a conveyance made on the meritorious consideration of blood, or affection to a child, or a settlement to a wife, is not, as matter of law, fraudulent and void as to existing creditors. Whether it is so or not depends upon all the circumstances of the transaction. If made when a person is deeply indebted, it furnishes *prima facie* evidence of fraud; but this may be rebutted or controlled, and the question of fraud is not one of law, but of fact for the jury." See also *Winchester v. Charter*, 12 Allen, 606; *Clark v. McMahon*, 170 Mass. 91; *Jaquith v. Massachusetts Baptist Convention*, 172 Mass. 489, 446.

3. The second ruling requested was rightly refused. The court could not properly give this ruling as matter of law. A debtor who conceals his property fraudulently may be regarded as insolvent, though his property may consist of money in his pocket, and may be sufficient to pay all his debts. *Bartholomew v. McKinstrey*, 6 Allen, 567, 569. *Blake v. Sawin*, 10 Allen, 340. But this is very far from saying that a man cannot when sued convey land to his wife, if he has at that time property much more than sufficient to pay his debts. Nor are we aware of any case that holds that he is obliged to go to his creditor and tell him just what bonds and securities he has. Whether there was any fraudulent concealment was a question for the jury. *Stratton v. Edwards*, 174 Mass. 374, 377.

4. What we have already said shows that the third request was properly refused.

5. We are also of opinion that the court was not bound to give the fourth request. There was no question whether the demandant had made out a *prima facie* case or not at any stage of the trial, until the close of all the evidence on both sides. There was therefore no occasion to determine whether the demandant could rest, on producing certain evidence, and call upon

the tenant to go into her defence, and then allow the demandant to introduce evidence in rebuttal. The fact that the demandant had made out a case sufficient to entitle him to go to the jury was not in dispute; but this fact did not change the burden of proof. *Gibson v. International Trust Co.* 177 Mass. 100, 103. To have given an instruction on this point at this stage of the case might well have misled the jury.

Moreover, the grantor in this case was not deeply indebted when the conveyance to the tenant was made, and so the case does not fall within *Cook v. Holbrook*, 146 Mass. 66, from which we have already quoted.

There are other grounds upon which it might be held that the judge was right in refusing to give the instruction requested. It is enough to say, in addition to what has already been said, that the judge was not bound to pick out particular facts and instruct the jury as to their effect. The case was for the jury on all the evidence.

Exceptions overruled.

FRANCES DRAKE vs. ROLLIN H. ALLEN & another.

Suffolk. March 8, 1901. — May 24, 1901.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

Evidence, Oral affecting writings.

In an action by an actress against the proprietor of a theatre, to recover for the breach of an oral agreement to employ the plaintiff during the fall and winter season of a certain year, the plaintiff was allowed to testify to a conversation with the defendant, which resulted in her signing a written contract for the summer season containing a provision that it might be terminated by either party by two weeks' notice in writing, and also resulted in an oral agreement for the following fall and winter season from which the two weeks' notice clause was by special agreement omitted. *Held*, that the defendant was in no way harmed by the admission of the evidence of the conversation, by which the plaintiff did not seek to vary or control the written contract, but merely to show the circumstances under which the oral agreement was made.

CONTRACT by an actress for breach of an alleged oral agreement to employ the plaintiff at the defendants' theatre, for the fall and winter season of 1898 and 1899, thirty-five weeks, at a salary of \$100 a week. Writ dated September 19, 1898.

At the trial in the Superior Court, before *Bishop, J.*, the plaintiff obtained a verdict for \$1,789.48; and the defendants alleged exceptions, which related wholly to the admission by the judge against the defendants' objection of the testimony of the plaintiff in regard to a certain conversation between her and one of the defendants. The general facts of the case are stated in the opinion of the court.

The evidence which was the subject of the exceptions was as follows:

"Q. Did you see him [*J. Herbert Emery*, one of the defendants] after that? A. Yes, sir; in a few days, I don't know how many, I found a contract in my box one evening when leaving the theatre, the 9th or 10th of June. I took the contract home, and looked it over, and in the morning I brought it back to Mr. Emery. — Q. Was that the contract [showing witness a paper]? A. Yes, sir. — Q. What was said at that time?" The counsel for the defendants objected to anything concerning the summer season, but the judge admitted the question. The defendants' counsel then said: "I suppose the things which are important are the conversations in relation to the hiring of this plaintiff for the fall and winter season of '99. Any conversation which she had in relation to the summer season, which is in the written contract, it seems to me is immaterial." The judge replied: "It certainly is, if standing by itself; but if part of the conversation related to the summer and winter seasons both, I suppose it must go in. I will see what it is. — Q. Now, will you state the conversation you had with him at that time? A. Yes, sir. I said, 'Mr. Emery, there is no line of business indicated in the contract.' He inserted a clause, 'Juvenile business when Miss Lawrence is on the bill, and leading business when Miss Lawrence is out of the bill.'" This was objected to by the defendants. The contract was handed to the judge for examination and marked as an exhibit. The judge admitted the evidence. The defendants excepted to the admission of the preceding answer, and of any conversation concerning the summer season. — "Q. Is that what was written in? A. Yes, sir; then I said, 'Mr. Emery, there is a two-weeks' clause in the contract,' and he said, 'That is only a matter of form. The contracts are all made out that way; but we will let

it go, and I shall assure you that you shall not receive two weeks' notice; and in the winter contract I will eliminate it.' I said, 'I should like my winter contract now.'" The defendants objected, and their objection was noted by the judge. — "Q. Now, if you will continue. A. He said, 'I assure you it will be eliminated from the winter contract, which we are not ready to give out just at present.' I said, 'There must be no misunderstanding in this matter; it is business with me; and I must be perfectly sure of my next season's work, for I have here a letter offering me a hundred dollars for the next season, which I consider in every way a favorable engagement, and I shall accept if there is a possibility of a misunderstanding.' He says, 'There is no misunderstanding; I now engage you for the winter season, for thirty-five weeks, at \$100 a week, with no two-weeks' clause.' — Q. What did you say to that? A. I said, 'Very well,' and declined that offer." The letter containing the offer declined by the plaintiff was then admitted in evidence against the defendants' objection.

H. G. Allen, for the defendants.

T. J. Barry, (*H. J. Jaquith* with him,) for the plaintiff.

LATHROP, J. This is an action for breach of an alleged oral agreement to employ the plaintiff, an actress, for the fall and winter season of 1898 and 1899, thirty-five weeks at \$100 a week. There was evidence that the plaintiff, at the request of the manager of the defendants' theatre in Boston, one Emery, went there at his request, on trial for two weeks, in April, 1898, and that an agreement was subsequently entered into between her and Emery, covering both the summer season of 1898, and the fall and winter season following; that she then signed a contract in writing for the summer season, at the salary of \$70 a week, and this contract contained the following clause: "This contract can be cancelled or annulled by either party upon giving two weeks' notice in writing."

The plaintiff contended that at the same time it was orally agreed between her and Emery that she should perform at the defendants' theatre, at the salary of \$100 a week, for the fall and winter season, unconditionally, without the right to terminate by notice, and that she consented to enter into the contract for the summer season in consideration of the absolute engage-

ment made at the same time for the fall and winter season. The defendants denied that any agreement was made for the fall and winter season, and alleged that the only agreement was for employment for the summer season by the written contract before stated; but that they subsequently offered to employ the plaintiff, and tendered to her a written contract for the fall and winter season, at a salary of \$70 a week, which contained the same provision for termination by notice as the contract for the summer; and that she declined to sign it.

No question is made of the authority of Emery to bind the defendants; nor is it disputed that the testimony of the plaintiff warranted the jury in deciding in her favor. The only exceptions relied upon are to the admission of portions of the plaintiff's testimony. It is contended that because a written contract was made for the summer season, no evidence of conversations prior and relating thereto was admissible. But the plaintiff did not seek to vary or control this contract. She was simply relating what took place at a certain interview when the agreement for the fall and winter engagement was made. We do not see that the defendants were in any way harmed by the admission of the evidence.

Exceptions overruled.

CATHERINE E. O'BRIEN vs. DENNIS W. MAHONEY.

Norfolk. March 12, 13, 1901. — May 24, 1901.

Present: HOLMES, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Partition, Writ of, Right of tenant in common. Probate Court, Jurisdiction.

Writs of partition, recognized by Pub. Sts. c. 178, § 1, still may be used in this Commonwealth, although abolished in England in 1834, and superseded here in practice by petitions for partition.

By the great weight of authority, every co-tenant is entitled as a matter of right to a partition. Per HAMMOND, J.

The general rule is that a tenant in common is entitled to partition as a matter of right, and the facts, that the estate of an ancestor, whose two heirs at law hold as tenants in common, is in course of settlement, that the uncontested charges against the estate exceed the amount of personal property shown by the inventory, and that one of the heirs at law has a pending claim against the estate greater, if sustained in full, than the inventoried value of both the real and per-

sonal property of the estate, afford no ground for denying a partition to the other heir at law.

Pub. Sts. c. 178, § 43, providing that where a party after partition of lands has been evicted from his share he is entitled to a new partition, applies to a partition made in the Probate Court, which under Pub. Sts. c. 178, § 45, has concurrent jurisdiction with the Supreme Judicial Court and Superior Court of petitions for partition in cases where the shares or proportions do not appear to be in dispute or uncertain.

Under Pub. Sts. c. 178, § 45, giving to the Probate Court concurrent jurisdiction with the Supreme Judicial Court and Superior Court of petitions for partition of lands in cases where the shares or proportions do not appear to be in dispute or uncertain, if the parties are heirs at law of an unsettled estate and their respective shares and proportions are ascertained, the Probate Court has jurisdiction, regardless of the fact that the estate of the ancestor is in course of settlement.

PETITION by one of the two heirs at law of Dennis Mahoney against the other for partition of certain real estate in Hyde Park, filed in the Probate Court for the County of Norfolk April 1, 1898.

In the Probate Court, *Flint*, J., ordered partition as prayed, and the respondent appealed.

The case came on to be heard on appeal before *Lathrop*, J., who, at the request of the parties, reserved it for the consideration of the full court upon the petition, the decrees thereon, and the agreed facts.

The following appeared by the agreed facts: The premises mentioned and described in the petition were owned by Dennis Mahoney at the time of his death on February 21, 1897. Dennis Mahoney left a widow, and two children, one of whom is the petitioner and the other the respondent. The widow died on April 21, 1897.

The petitioner and respondent were the only heirs at law of Dennis Mahoney and of his widow. Dennis Mahoney and his widow both died intestate, and no dower or other interest in the lands was ever set off to the widow, or specifically claimed by her.

The respondent, Dennis W. Mahoney, was duly appointed administrator of the estate of his father, Dennis Mahoney, the petitioner, his sister, assenting to the appointment. The petitioner alleges that at the time of giving such assent she was ignorant that any claim was made by her brother upon the estate of her father, and the respondent alleges that she knew that he had a claim against the estate.

On April 27, 1898, the respondent filed an account as administrator in the Probate Court for the County of Norfolk, and the account, upon the remonstrance of the petitioner, was referred by the Probate Court to an auditor, and the hearings before the auditor were not closed at the time of the reservation of this case.

The inventory of the estate of Dennis Mahoney showed personal property valued at \$368.85 and real estate valued at \$18,771.40. It was agreed that the uncontested charges against the estate exceeded the amount of the personal property shown in the inventory. The amount claimed by the respondent to be due to him from the estate according to the account filed by him as administrator and pending before the auditor was \$19,621.24.

C. F. Jenney, for the respondent.

F. Rackemann, (*J. D. Colt* with him,) for the petitioner.

HAMMOND, J. Upon this petition filed in the Probate Court by one of the two heirs of Dennis Mahoney, deceased, intestate, the court ordered a partition to be made. The respondent appealed, and in support of the appeal insists that the settlement of the estate has not reached such a stage as to make it proper to order partition, because there is a large claim still pending against the estate and the land in question is liable to be sold for the payment of debts. It appears in the statement of agreed facts that the uncontested charges against the estate exceed the amount of personal property shown in the inventory, and that the respondent in the account filed in the Probate Court asks to be allowed several thousand dollars which he claims to be due to him from the estate. If his claims are finally sustained in full, the amount due him will exceed the inventoried value of both the real and personal estate, the real estate being inventoried at nearly \$19,000 and the personal at less than \$400. This account, upon motion of the petitioner, was referred by the Probate Court to an auditor, who is still engaged in the hearing. From the nature of the claim it is possible that the litigation may continue for some time.

Neither as administrator, nor as creditor, is the respondent interested in this question, because partition, if made, cannot affect him in either capacity. His only standing in this pro-

ceeding is as a tenant in common with the petitioner, and the question is whether against him as such the partition at this time should be ordered.

By the common law of England the writ of partition could issue only in favor of a parcener, but quite early the remedy was extended by statute to joint tenants and tenants in common of estates of inheritance, of freehold, and for years. Co. Lit. 167 *a*. St. 31 Hen. VIII. c. 1. St. 32 Hen. VIII. c. 32. Allnatt on Partition, 53, 56. The common law, as thus modified by statute, became a part of our common law when our ancestors came to this country, and was recognized by our provincial statutes, 6 Dane Abr. 479, § 3, *Cook v. Allen*, 2 Mass. 462, *Mussey v. Sanborn*, 15 Mass. 155, Prov. St. 1693, c. 8; 1 Prov. Laws (State ed.) 122, Prov. St. 1753-54, c. 18; 3 Prov. Laws (State ed.) 710, Anc. Chart. 258, 603, and afterwards by the statutes of the Commonwealth; and to this day the writ may be used here, St. 1785, c. 62, § 2, Rev. Sts. c. 103, § 1, Gen. Sts. c. 136, § 1, Pub. Sts. c. 178, § 1, although for two generations it has been abolished in England. St. 3 & 4 Wm. IV. c. 27, § 36.

But the writ failed to meet the exigencies which frequently arose in practice, and the same reasons, which led to the jurisdiction of equity in England over cases of partition, led in this Province and State to the introduction of a method of partition by proceedings under a petition, either in a common law court, or before a judge of probate; and this remedy, extended and improved from time to time, has substantially superseded in practice the old writ. See among others Prov. Sts. 1748-49, c. 12; 3 Prov. Laws (State ed.) 426; 1753-54, c. 18; 3 Prov. Laws (State ed.) 710; Anc. Chart. 568, 603; St. 1783, c. 41; Rev. Sts. c. 103; Gen. Sts. c. 136; Pub. Sts. c. 178. The writ at common law issued as of right, and, the title of the petitioner being established, partition was ordered as of course, even to the great inconvenience and loss of the parties. The great weight of authority is that every co-tenant is entitled as matter of right to a partition. Allnatt on Partition, 85. Freeman on Partition, § 433, and cases there cited. *Parker v. Gerard*, Amb. 236. *Hanson v. Willard*, 12 Maine, 142, 147.

And such is the rule under our statutory proceedings. This court in *Mitchell v. Starbuck*, 10 Mass. 5, 12, said: "It is essen-

tial to an estate in common to be subject to partition"; in *Potter v. Wheeler*, 13 Mass. 504, 507: "It is always in the power of one tenant in common to enforce a partition"; and in *Crocker v. Cotting*, 170 Mass. 68, 70: "Partition is a matter of right." In this latter case some of the leading authorities were cited. See also Pub. Sts. c. 178, § 1. No man can be held to a tenancy in common of land without his own consent. This rule is at once the privilege and burden of such ownership.

Upon the death of the intestate, the land in question went to his heirs, the petitioner and the respondent, as tenants in common. If needed, a part or the whole of it, may be sold by the administrator for the payment of claims against the estate, but until so sold the title is in the heirs. It is not suggested that it cannot be physically divided so that each tenant can hold in severalty. It may be that hereafter the land, or some part of it, may be sold for the payment of debts, but it is not certain that any of it will be, or that, if any is sold, the equality of the partition will be substantially disturbed. Indeed, if there be a partition, and a sale afterward is necessary, it is within the power of the Probate Court to see to it that the land selected for sale be such that the equality be not disturbed. To say that there shall be no partition until it is apparent that neither of the parties can be evicted by any sale by the administrator, is to say that, in cases where any part of the land may be needed for the debts, the heirs shall be deprived of a right to partition, as to any of it, and cannot have the consolation of individual ownership during the little time the law casts the title upon them. The litigation over this account of the administrator may extend for years, and meanwhile upon this theory the petitioner must endure the inconveniences of common ownership.

Nor can any injustice be done to the parties. In case of any eviction by sale after the partition, the evicted party is not without remedy. Such eviction would be by a title older and better than that of the parties to the partition, and would come within the terms of Pub. Sts. c. 178, § 43. It is true that this section as originally enacted was made applicable only to a partition by proceedings in the common law courts, but it was simply declaratory of the common law. By that law a parcener, in case of eviction, could defeat the partition or obtain a recom-

pense for the part she lost, and the right of recompense *pro rata* was given by the statutes of Henry above mentioned to joint tenants and tenants in common. Co. Lit. 174 a. St. 31 Hen. VIII. c. 1, § 3. And this is a part of our common law, and the rule prevails in the statutory proceedings in our common law courts. In *Cook v. Allen*, 2 Mass. 462, 473, wherein the court had occasion to consider the effect of a partition made in this court under a statutory proceeding, Parsons, C. J., said that if a right of possession passed by the judgment of partition so that the petitioner "became sole seized under it, then, if the owner should bring his writ of right, and evict him by a title paramount, he would be entitled to a new partition of the residue." The rule stated in Pub. Sts. c. 178, § 43, that, if the tenant was evicted of any part of the share assigned to him he might have a new partition of the residue as if no partition had been made, first appears as a statute in Rev. Sts. c. 103, § 42, and was there inserted upon the recommendation of the commissioners, who say in a note that the "rule is taken from the opinion of the court in 2 Mass. 473; and is in accordance with the common law on the same point." See also the cases cited in Freeman on Partition, § 533. It is true that this petition is in the Probate Court and, in view of the peculiar language of the early statutes conferring upon that court the power to make a distribution of land among the heirs of an estate in process of settlement therein, (see Prov. Sts. 1692-93, c. 14; 1 Prov. Laws (State ed.) 43; 1760-61, c. 13; 4 Prov. Laws (State ed.) 400; Anc. Chart. 230, 634; St. 1783, c. 36, § 4; St. 1817, c. 190, § 24,) and of the limited jurisdiction of that court, there might be a question as to whether this rule was applicable to a partition made therein. But by St. 1869, c. 121, probate courts were empowered to make partition of lands held by joint tenants, parceners, and tenants in common, when the shares are not in dispute, in all cases. St. 1874, c. 266, repealed this statute, but provided that such courts should have concurrent jurisdiction with the Supreme Judicial Court and the Superior Court of petitions for the partition of lands held by joint tenants, coparceners, or tenants in common, in cases where the shares do not appear to be in dispute or uncertain, with a proviso that, whenever in the progress of the case it appears to the judge that the

shares are in dispute or uncertain, "the court may order the case removed to the Superior Court, and the case shall be so removed at the request of any party in interest." This statute was re-enacted in Pub. Sts. c. 178, §§ 45-47.

The Probate Court, in exercising jurisdiction under this statute, must be held to be doing the same work with like result to all parties, as if it were done in either of the other courts; and Pub. Sts. c. 178, § 43, must be held applicable to the work thus done and the rights of the parties under it. While the petition in this case recites that the estate of the ancestor is in course of settlement in the court, still it gives the names of the parties, sets out the respective shares and proportions, and alleges that they are not in dispute or uncertain; and the decree of the court recites that the shares or proportions are not in dispute. This finding gives the court jurisdiction under Pub. Sts. c. 178, § 45, whether the estate of the ancestor is in course of settlement or not, as to which the decree in this case makes no recital.

Under these circumstances, we see no reason why the land should not be divided.

Decree affirmed.

ROBERT FIRTH vs. JOHN W. RICH & another.

Suffolk. March 15, 1901. — May 24, 1901.

Present: HOLMES, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Negligence, In driving.

In an action against a teamster for injuries to the plaintiff caused by being thrown from the back of a covered one horse wagon of the defendant, it appeared, that the defendant had been employed by a carpenter for whom the plaintiff worked, to transport some materials from a building to the carpenter's shop, and that the plaintiff got into the wagon at the invitation of the driver and of his employer, that the wagon stopped about five feet from the door of the shop, there being another team in the way, and the plaintiff was standing in the back of the wagon and was about to hand out a box to his employer, when the horse started and he was thrown out. The horse probably was started by the driver in trying to get his wagon to the right place in front of the shop door, the other team having moved away. *Held*, that there was no evidence of negligence on the part of the driver. The facts that the wagon moved and that the plaintiff, with-

out the driver's knowledge, happened to be standing in such a way as to lose his balance when it started, would not justify a finding that the driver was negligent. There was nothing that required the driver to give notice that he was going to move forward five feet.

TORT to recover for injuries to the plaintiff, by being thrown out of a wagon of the defendants through the alleged negligence of the defendants' driver. Writ dated June 15, 1899.

At the trial in the Superior Court, before *Gaskill*, J., it appeared, that at the time of the accident the plaintiff was a carpenter in the employ of one Bates, a jobbing carpenter, who was the proprietor of a carpenter shop at 64 Broad Street in Boston. The defendants were co-partners, under the name of Rich and Company, conducting a teaming and trucking business in Boston.

Bates, called as a witness by the plaintiff, testified, that at the time of the accident he employed four men; that the plaintiff had been employed by him for about two years and was in his employ at the time of the accident; that the witness had been acquainted with the defendants about five years, and when he had any teaming he called on them to do it, and they sent him a monthly bill.

The counsel for the defendants stated that he did not contend that the defendants were servants of the witness. It was admitted that when Bates wanted any teaming done he said so, and a bill was sent in at the end of the month for what had been done. The defendants furnished the teams with drivers. Bates exercised no control over the drivers except to tell them where he wished to go.

The witness further testified, that the defendants had one team at the stand on Broad Street, which was the team used by the witness; that they had other teams at other stands; that on the day of the accident the plaintiff was working at No. 76 Pearl Street in Boston, the back part of which was on Hartford Street; that the witness got the defendants' team, which had its stand on Broad Street, to go to Hartford Street; that the plaintiff had finished his job at Hartford Street when the witness and the driver got there; that the team was a one horse covered wagon; that it belonged to the defendants; that it was an ordinary sized wagon about the size of an express wagon;

and that the cover of the wagon was rounded at the top corners. The driver was in the employ of the defendants.

When the witness got the team to go to Pearl Street, he got on the wagon with the driver and went with him. The witness further testified, that they then went to Hartford Street; that the driver drove the team; that after reaching Hartford Street the witness got off, got into the elevator and went up into the loft, got his stock that was left from the job and brought it down on to the first floor and put it on the team; that they put on to the team some four or five matched boards, a piece of joist and a box of tools; that the box of tools was a small hand box that one could carry handily on small jobs; that the boards were sixteen feet long and ten inches wide; that the joist was ten to twelve feet long and three inches wide by two inches thick; that he could not state who put the things into the wagon; that after the materials were loaded on, he got on to the seat with the driver, and the plaintiff got into the body of the wagon; that they then went to the witness's shop on Broad Street. The driver did the driving. The plaintiff rode in the back part of the team. The witness thought the plaintiff sat on the back edge of the seat facing towards the rear of the wagon. When they reached the shop, the team drove up within about five feet of the shop door. "In front of it was an express wagon, an American Express wagon, so that we could go no farther. I got off my side and passed around the wagon to the back of it to take Mr. Firth's box of tools. As he went to pass them to me he came out of the wagon, the horse started, he came out of the wagon and down on the street on to the paving; came down standing."

The witness further testified, that when they drove up within five feet of the door of the witness's shop and found the American Express team in front of them, the driver of the American Express team was not in his wagon; and that the witness did not see him. The street at that time was paved with granite. The plaintiff was passing out his hand box of tools at the time that he was thrown out.

The witness further testified, that when the plaintiff was thrown out, or at the moment before he was thrown, the witness judged that the plaintiff was about to get out of the wagon; that the plaintiff was back to the horse; that the tools

the plaintiff passed out came down with him. The express team when, or after, the plaintiff had fallen out, was pulled out into the street.

“ Q. And what was the defendants’ team doing after Mr. Firth was thrown out? A. He simply started ahead about five feet — five or six feet — and stopped. — Q. So as to bring the team precisely in front of your door? A. Yes, sir.”

The American Express team had been pulled out of the way.

The plaintiff testified as follows: that he was a carpenter; that he was sixty years of age; that he had worked for Bates for about two years before the accident; that the accident occurred on March 8, 1899; that on that day he was working in a building on Hartford Street; that he finished the job about noon; that just before noon they carried down on the elevator the things left after the completion of the job; that there were some pieces of lumber, a box of nails, a step ladder, two saw horses, and some tools; that the tools belonged to the plaintiff and the rest of the things to Bates; that after getting the things on the sidewalk the defendants’ driver, Bates and the plaintiff together loaded them on to the defendants’ team.

“ Q. And then what occurred? A. They got into the team — Mr. Bates and the teamster got on and asked me to get on. — Q. Which one asked you to get on? A. They both asked me. I was going to walk to the shop; my tools were in the wagon and I was going to walk, and they said, ‘Get in and ride.’ ”

The plaintiff further testified, that he got into the wagon and sat on the back part of the seat facing toward the back of the wagon; that Bates and the driver sat on the front of the seat, one on each side of him. “When we got to Broad Street the team drove up as far as he could; an express wagon stood ahead of him. Mr. Bates got off and the driver got off, one on each side, and I sat — passed the stuff from where it was piled in the wagon to the tail of the wagon, where it would be handy to pass out, and when I got it there I stepped to pass it out to Mr. Bates. Mr. Bates was at the tailboard of the wagon, standing on the ground, and I was inside. I was facing out, at the rear of the wagon. And in the act of reaching down to pass him some things — I think it was a box of nails — was the first thing

I had ; I reached down to pass it to him, and out I went ; the team started and out I went. And as I went out, slid out over the tailboard, I went down pretty heavy. Mr. Bates threw his arm and kind of prevented me from falling forward, and I struck right on my heels, on the hard paving.

“ *Q.* Now, after striking on your heels on the pavement, Mr. Firth, what did you do? *A.* When Mr. Bates released me, I walked up and leaned agin the building. — *Q.* Standing on the sidewalk? *A.* Yes, on the sidewalk. I walked up and leaned agin the side of the building. — *Q.* What did you see then? *A.* I see the driver have the horse by the head and leading him out into the street. — *Q.* And what did he do? *A.* He was having some strong words with the driver of the other wagon at the time.”

At the conclusion of the testimony introduced by the plaintiff, the judge, on motion of the defendants, directed the jury to return a verdict for the defendants ; and the plaintiff alleged exceptions. The plaintiff also took two exceptions to the exclusion of evidence offered by him, but the decision of the court has made them immaterial.

E. I. Baker, for the plaintiff, submitted the case on a brief.

W. I. Badger, for the defendants.

HOLMES, C. J. This is an action for personal injuries. The plaintiff was a carpenter employed by one Bates. Bates employed the defendants to carry some materials from a building where he had been working to his shop. It is admitted that they were not fellow servants with the plaintiff. The wagon used was a covered one horse wagon. Bates got in, and then the plaintiff got in by invitation of the driver and Bates. When they reached the shop, the wagon stopped about five feet from the shop door, there being an American Express wagon in front which prevented their getting nearer. The driver and Bates got out, and the plaintiff was standing in the rear of the cart about to hand out a box of tools to Bates, when the horse moved forward and the plaintiff lost his balance and went out, lighting on his heels and being badly hurt. The evidence is obscure as to how the accident happened. Bates testified that after the plaintiff was thrown out the driver simply started ahead about five feet, so as to bring his team in front of the shop door, that

the American Express wagon had been pulled out of the way, and that the driver of the express wagon was not with it at the moment of the accident but came out of a neighboring store after the plaintiff was hurt. At the trial the judge directed a verdict for the defendants, and the plaintiff excepted.

All the testimony relates to a state of things at a time, it is uncertain how long, after the accident, so that it is something of a strain to say that the jury fairly might have inferred that the driver moved the horse rather than that the horse moved of itself without anybody's fault. But if it may be said on the whole to be more probable that the driver started the movement from the beginning, as he certainly controlled it at the end, it is hard to say that he was negligent in doing so. It does not appear, and it is not likely, that he could see the plaintiff. The start followed very shortly upon the first stop, and the first stop evidently was not at the exact point to be reached. It would be extravagant to decide that a driver on reaching his destination and wishing to get his wagon into the right place must go to the rear of the wagon in order to see that no one is in a position to be hurt by such a usual, slight movement; and in view of what we know of daily life it would be academic to require him to give notice that he is going to move forward five feet, when he has no reason to suppose that any one is in a dangerous position. There was no violent start, — nothing but the fact that the wagon moved, and that the plaintiff, without the driver's knowledge, happened to be standing just in such a way as to lose his balance and to go out. Taking into account the rather dim representation of the case given us by print, we cannot say that the judge who heard it all was wrong.

Exceptions overruled.

EMMA L. COBB vs. BOSTON ELEVATED RAILWAY COMPANY.

Middlesex. April 3, 1901. — May 24, 1901.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

Negligence, On street railway. Street Railway, Duties of conductor.

It is the duty of a conductor of a street car to remove at once an intoxicated passenger who is vomiting profusely, and he need not wait until a woman passenger who has just entered the car has taken her seat and left the aisle clear.

A passenger in a street car assumes the risk of collision with an obnoxious drunken passenger whom the conductor is removing by force in a reasonable manner. Following *Spade v. Lynn & Boston Railroad*, 172 Mass. 488.

TORT for injuries alleged to have been incurred by the plaintiff from the negligence of the conductor of the defendant while removing a drunken passenger from a car of the defendant in which the plaintiff was a passenger. Writ dated January 18, 1900.

In the Superior Court, *Sherman, J.*, refused to rule, at the request of the defendant, that there was no evidence which would warrant a jury in finding a verdict for the plaintiff, and left the case to the jury, who returned a verdict for the plaintiff in the sum of \$600. The defendant alleged exceptions. The case is fully stated by the court.

G. L. Mayberry, for the defendant.

E. B. Hale, F. E. Dickerman & S. J. Elder, for the plaintiff.

LATHROP, J. This is an action for personal injuries alleged to have been sustained by the plaintiff, while a passenger on a car of the defendant, by reason of the negligent act of the conductor of the car in removing a drunken passenger.

According to the plaintiff's testimony, as she entered the car by the rear door, she noticed a man sitting on the right hand side of the car and about five or six seats from the door, who appeared to be intoxicated, and was vomiting profusely in the aisle; that she started for the first vacant seat, which was four or five seats from the door; that the conductor rushed by her, and, going up to the man who was vomiting, took him by the shoulders and conducted him toward the rear door; that she had

reached the seat, turned round, and was just in the act of seating herself when they went by her, the drunken man being nearer to her than the conductor; and that in some way as they passed she was tripped up; that she thought that the foot of the drunken man struck and tripped her; and that she fell on her knees on the floor of the car, and was injured.

One of the other passengers, who testified in behalf of the plaintiff, said that the drunken man put out his feet to brace himself, so as to prevent the conductor from getting him out of his seat; and that he thought as the drunken man put out his feet, one of them came in contact with the plaintiff, who was about to seat herself, and tripped her so that she fell forward on her knees. He further testified that the drunken man was in a sleepy condition, and did not disturb anybody until he began to vomit.

It was in evidence that it was a rule of the defendant that the conductor should immediately remove from the car any person who by reason of intoxication made himself obnoxious to other passengers; and that it became the duty of the conductor in compliance with this rule to remove the intoxicated man at once when he began to vomit.

The defendant requested the judge to rule that there was no evidence which would warrant the jury in finding a verdict for the plaintiff. The judge refused so to rule; and the case is before us on the defendant's exception to the refusal to give this ruling.

We need not consider whether the plaintiff was in the exercise of due care in not stopping the car, or retreating to the rear platform when she saw the condition of things inside the car, as we are of opinion that there was no evidence of negligence on the part of the conductor of the car; and that the judge should have so ruled.

It is not contended that the conductor was negligent in admitting the man to the car; and it is conceded that it was his duty to remove the man promptly; but it is urged that before doing so he should have waited until the plaintiff was seated and the aisle was clear. This seems to us to be refining too much. It is the duty of a conductor in such a case as this to act at once, and to remove the obnoxious person; and his act was a lawful

one. *Vinton v. Middlesex Railroad*, 11 Allen, 304. *Sullivan v. Old Colony Railroad*, 148 Mass. 119. In *Spade v. Lynn & Boston Railroad*, 172 Mass. 488, a similar case, it was said: "So far as appears, the conductor was acting rightly in putting the drunken man off the car. As against the plaintiff, he was doing one of the things which she had to contemplate as liable to happen when she got into the car. We all know that, if people are standing in the passageway of a street car, you cannot remove a man forcibly through the passageway without more or less contact. If the fall upon the plaintiff was the necessary consequence of a lawful and reasonable act, then it was one of the risks which she assumed when she took her passage." We can see no material difference between that case and the one before us.

Exceptions sustained.

JOHN H. MCAULIFFE vs. FANNY DYME.

Middlesex. May 6, 1901. — May 24, 1901.

Present: HOLMES, C. J., KNOWLTON, LATHROP, HAMMOND, & LORING, JJ.

Mechanic's Lien, Sufficiency of issues for jury.

If a respondent to a petition to enforce a mechanic's lien wants further issues presented to the jury, he must ask for them under Pub. Sts. c. 191, § 21, and, having omitted to do so, he cannot object after a finding for the petitioner on each of the issues presented to the jury, that the findings are not sufficient to justify the establishment of the lien. If the issues and the answers thereto do not make out a case, the court will assume that the other necessary facts were conceded or found by the judge.

PETITION to enforce a mechanic's lien for services performed by the petitioner as an architect on a building on Massachusetts Avenue in Cambridge owned by the respondent, filed December 7, 1899.

The Superior Court made a decree establishing the lien for \$2,325 damages and \$131.98 costs. From this decree the respondent appealed.

The issues submitted to the jury in the Superior Court and the answers to them were as follows:

"1. Did the respondent enter into a contract with the petitioner as set forth in the petitioner's petition? The jury answer, Yes. 2. Was the labor performed as set forth in the petitioner's account annexed? The jury answer, Yes. 3. What is the value of said labor? The jury answer, \$2,325. 4. Did the petitioner within thirty days from the twenty-fifth day of October, 1899, file in the Middlesex South District Deeds a statement of a just and true account of the amount due him with all just credits given? The jury answer, Yes. 5. At the time said statement was filed by said petitioner did he knowingly and wilfully claim more than was his due? The jury answer, No."

The only contention of the respondent was that the answers to the above issues alone were not sufficient to justify the decree.

J. H. Vahey & C. H. Innes, for the respondent.

A. J. Daly, for the petitioner.

LATHROP, J. This is an appeal from a decree of a justice of the Superior Court establishing a mechanic's lien upon a parcel of land in Cambridge, for a certain amount. The record contains a copy of the petition, the answer, five issues of fact, to which the jury returned answers in favor of the petitioner, the decree, and an appeal therefrom by the respondent.

The only ground urged by the appellant is that two other questions should have been put to the jury and passed upon, namely, whether the labor was performed by virtue of the agreement provided for in the statute, and that the statement required by the Pub. Sts. c. 191, § 6, was properly filed.

The short answer to the appellant's contention is that if she desired further issues to the jury she should have asked for them, as she had the right to do under the Pub. Sts. c. 191, § 21. If there is no contention about any fact, there is no necessity of submitting an issue concerning that fact to the jury; and it must be assumed, as against the appellant, that, if the issues and the answers thereto do not make out a case, the other necessary facts were conceded or found by the judge.

Decree affirmed.

FRANK IRVING *vs.* LEONARD A. FORD, administrator.

Suffolk. March 12, 1901. — May 25, 1901.

Present: HOLMES, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Marriage, Between slaves. Child, Statutory legitimation. Conflict of Laws, Extritorial effect of law affecting personal status. Slave, Escaping to free State. Dis-seisin.

Whatever may be the presumption as to the common law in this country concerning marriages between free persons, there is no presumption that the common law of Virginia in 1846 gave any effect to a ceremony of marriage between slaves performed by the master of one of them followed by a cohabitation of eight years.

The statutory legitimation of a child can be brought about without the fact or fiction of a marriage, by a simple fiat. Per HOLMES, C. J.

A statute of Virginia legalizing the marriages of colored persons living together as husband and wife on February 27, 1866, provided, that, where the parties had ceased to cohabit before that date, all the children of the woman recognized by the man to be his should be deemed legitimate. Before the date named in the statute a man slave left his slave wife in Virginia and acquired a domicile in Massachusetts. Later he visited Virginia and there recognized as his a child of his slave marriage domiciled there. The father died intestate, domiciled in Massachusetts and leaving property here. *Whether* the Virginia child was entitled to the distributive share of a legitimate child in Massachusetts, or whether in order that the statute should have such extritorial effect both parties must have been domiciled in Virginia when the act of recognition was performed, even if the domicile of the child and the bodily presence of the father would be sufficient to make the statute operative in Virginia, *quare*.

By the common law a disseisor got a title, although by wrong, and left only a right of action to the disseisee. So, a runaway slave, so long as he was *de facto* free, though liable to recapture, had the civil rights of a free person in a free State to which he had escaped. Per HOLMES, C. J.

Before the abolition of slavery a marriage in this Commonwealth of a fugitive slave was lawful while he remained here, whatever effect recapture might have had upon it. Such a marriage continuing after the abolition of slavery is not to be disturbed.

PETITION, in the Probate Court, of Frank Irving, of Portsmouth in the State of Virginia, alleging that he is the heir at law of Robert Irving, otherwise known as Sheridan W. Ford, of Chelsea in the Commonwealth of Massachusetts, and further alleging that Leonard A. Ford falsely had represented himself to be a son of Robert Irving, otherwise known as Sheridan W. Ford, and had petitioned the Probate Court for letters of admin-

istration to be issued to him, falsely declaring that Mary A. Ford, widow, and Leonard A. Ford, a son, and Annie E. Ford, a daughter, were the only heirs at law and next of kin of the deceased, the present petition praying that these names might be stricken out of the petition for administration and those of Frank Irving, son, and Julia Ann Brown, widow, be inserted in their stead, filed July 7, 1899.

In the Probate Court, *Grant*, J., dismissed the petition, and the petitioner appealed. The case was heard by *Lathrop*, J., who, at the request of the petitioner, reported it for the consideration of the full court, finding the facts to be as follows :

" In or about the year 1846 the intestate, Robert Irving, otherwise known as Sheridan W. Ford, father of the petitioner, was a slave owned by Miss Brown and living at Portsmouth, Virginia. Julia Ann Gregory, the mother of the petitioner, was also a slave, owned by General John Hodges of Portsmouth, Virginia. Sheridan W. Ford and Julia A. Gregory, with the consent of their owners, went through the form of marriage at the house of General Hodges, owner of Julia Ann, on the corner of North and Middle Streets in said Portsmouth, about the year 1846. General Hodges, in the presence of his own family and witnesses, performed the ceremony, reading from a book, and pronounced them husband and wife. Immediately after this ceremony Julia Ann Gregory and Sheridan W. Ford took up their residence in the basement of General Hodges' house. They lived there together for about eight years as husband and wife, and were so reputed to be in the community. During this union three children were born to said Robert and Julia at General Hodges' house, — George, Robert, and Frank, the petitioner and sole survivor, George and Robert being dead. About the year 1854, some eight years after the marriage of Robert and Julia, Robert, in order to evade an effort of his owner to sell him, escaped from slavery, came to Massachusetts, and changed his name to Sheridan W. Ford. The owner of Julia, fearing that she also would escape and follow her husband, placed her in the jail at Norfolk, Virginia, where she remained five months. She was then sent to Goldsboro, North Carolina, where she remained until 1865, when she returned to Portsmouth, Virginia. Julia did not

hear from Robert until eleven years after their separation. In the mean time Julia married one Killis Bunn, a slave, probably in 1857 or 1858, and after his death she married one Joseph Brown, in the year 1870, at Portsmouth, Virginia. About the time of the escape from slavery of Robert Irving, otherwise known as Sheridan W. Ford, there also escaped from slavery one Clarissa Davis, otherwise known as Mary D. Armstead, the mother of the respondent, who was also a fugitive slave owned at Portsmouth, Virginia. Prior to 1861 the said Sheridan W. Ford and Mary D. Armstead formed a relation in this Commonwealth, there being this evidence of a marriage, to wit, the record of marriage intentions dated November 19, 1856, in the clerk's office in the city of New Bedford in this Commonwealth, of two persons of the name of Sheridan W. Ford and Mary D. Armstead; also a newspaper announcement of a marriage between two persons of the same names on November 20, 1856, and a marriage certificate found after the death of both parties among the effects of Mary D. Armstead. Sheridan W. Ford and Mary D. Armstead lived together as man and wife at Chelsea in this Commonwealth until the death of said Ford on December 22, 1898. Two children were born of this union, Annie Ford and Leonard A. Ford, the respondent, who has been granted letters of administration. In 1865 Sheridan W. Ford wrote to his former wife Julia Ann, and asked her to send his son Robert to him at Chelsea; she sent him, and Robert lived with his father's family in Chelsea for some time. Sheridan W. Ford visited Portsmouth, Virginia, twice after the war of the rebellion, recognized the petitioner Frank Irving as his son, dining with him and his mother and Killis Bunn, her second husband, in 1868, and giving his son Frank clothes and also a gold watch. Frank Irving, the petitioner, visited his father and family in Chelsea, Massachusetts, where he was recognized and treated as a son and brother. Upon Sheridan W. Ford's last visit to Portsmouth, he gave Frank Irving the watch, and said to him: 'Son, I am not coming here any more; it makes me sick in my stomach when I look at the place and see how I had to go away from my wife and children. Here is a watch, take it, it is nothing common, and when I die a part of my property will be yours. You will get your share of it.' "

The statutes and laws of Virginia bearing on the case were admitted in evidence.

The report of the justice concluded as follows: "On the evidence I was of opinion that the marriage in Virginia was not a legal marriage, and that the enabling statutes of Virginia did not apply to it; that the evidence was sufficient to show a legal marriage between the father and mother of the respondent; and I find that such a marriage took place. I was therefore of opinion that the decree of the Probate Court should be affirmed."

Such order or decree was to be made as to the court should seem meet.

The statute relied on by the petitioner as accomplishing his legitimation by the acknowledgment of his father was passed February 27, 1866, and was embodied in the Code of Virginia of 1873, Title 80, c. 103, § 4, as follows:

"Where colored persons before the passage of this act shall have undertaken and agreed to occupy the relation to each other of husband and wife, and shall be cohabiting together as such at the time of its passage, whether the rites of marriage shall have been solemnized between them or not, they shall be deemed husband and wife and be entitled to the rights and privileges, and subject to the duties and obligations of that relation in like manner as if they had been duly married by law; and all their children shall be deemed legitimate, whether born before or after the passage of this act; and when the parties have ceased to cohabit before the passage of this act in consequence of the death of the woman, or from any other cause, all the children of the woman recognized by the man to be his shall be deemed legitimate."

This statute later was embodied in the Code of Virginia of 1887, § 2227, without substantial change.

W. H. Lewis & B. W. Wilson, for the petitioner.

D. F. Kimball, for the respondent, submitted the case on a brief.

HOLMES, C. J. This case arises on a petition to the Probate Court to amend the record of a petition for administration by substituting other names as the next of kin, and also to remove the administrator appointed on the earlier petition. The ground of the present proceeding is that the petitioner is the lawful son

of the deceased, and that the respondent, the administrator, is not a lawful son as he alleged. The Probate Court dismissed the petition, and on appeal the case was reported to the full court by a single justice. The facts were these. The petitioner's father and mother were slaves. In 1846, by consent of their owners, they went through a form of marriage in the presence of the master of one of them, and afterwards lived together for eight years, during which time the petitioner was born. In 1854 the father escaped to Massachusetts, and there, in 1856, married another woman, by whom he had a son, the respondent, and a daughter. He lived with this woman until his death in 1898. After the war the petitioner was recognized by the deceased in Virginia as his son.

The petitioner's first contention is that the marriage of his parents in Virginia was valid. This may be disposed of in a few words. It is not argued that the ceremony helped the marriage, but the validity is put on the supposed rule of the common law as to marriage *per verba de præsenti* followed by cohabitation. The single justice found that this so called marriage was void, and we certainly cannot say that he was wrong. In view of this finding upon a question of fact, whatever may be the presumption as to the common law in this country concerning marriages between free persons, we cannot presume that the common law of Virginia gave to such a marriage as we have described between slaves any legal effect. It does not appear what evidence was laid before the single justice, but it may be that his attention was called to *Scott v. Raub*, 88 Va. 721, 723. See further, *Hall v. United States*, 92 U. S. 27, 30. The statute next to be cited seems to imply that apart from it the parties would not be married. See also the Constitution of Virginia, art. 11, § 9.

The second ground upon which the petitioner seeks to maintain his legitimacy is the Virginia statute passed February 27, 1866, c. 18, § 2 (embodied in the Code of 1873, Title 30, c. 103, § 4; ed. 1887, § 2227). Assuming that the last words of the section would be sufficient to legitimate the petitioner if both he and his father had been domiciled in Virginia after the act was passed, the question is whether they have that effect when the father is domiciled out of the State. They might do so

without bastardizing the Massachusetts children, because legitimation can be brought about without the fact or fiction of a marriage, by a simple fiat. See *Fitchett v. Smith*, 78 Va. 524; *McKamie v. Baskerville*, 86 Tenn. 459. But the doubt is whether, inasmuch as legitimation deals with a relation, both parties to the relation must not be subject to the power of the Legislature that seeks to affect it before a statute can do so in a way that will be recognized beyond the territorial limit of its power. It might be argued further that both parties did not become subject to the law-making power by the domicile of one and the transitory bodily presence of the other within the State, but that both parties must be domiciled there in order that the power should exist. See *Minor v. Jones*, 2 Redf. 289, 298; *Minor*, Conflict of Laws, § 100; *Blythe v. Ayres*, 96 Cal. 532; *Mulhall v. Fallon*, 176 Mass. 266.

We shall express no opinion upon the difficulty which we have stated because, although the case was very well argued, this precise point was but slightly touched, and because at this stage a decision of the question is not necessary.

As a decision that the petitioner is a legitimate son of the deceased would not carry with it the consequence that the Massachusetts marriage was void and the children of it illegitimate, it would not follow from such a decision that the petitioner is entitled to administration, supposing him to be competent and suitable within Pub. Sts. c. 130, § 1, cl. 3. St. 1890, c. 265. That consequence would follow only in case it should be held on general grounds that the marriage in this State of a runaway slave before the abolition of slavery was void, if, as we must take it in this case, a marriage in the domicile of his master would have been void.

Notwithstanding the weight of argument and authority to the contrary which will be found summed up in Cobb on Slavery, §§ 227-239, it was the settled doctrine of this State that a slave brought here by his master for even a temporary residence could not be removed from the State against his will. *Commonwealth v. Aves*, 18 Pick. 193. *Commonwealth v. Taylor*, 3 Met. 72. *Jackson v. Phillips*, 14 Allen, 539, 563, 564. In some respects, notwithstanding Article 4, § 2 of the Constitution of the United States, it is easier to recognize a *de facto* freedom

in the case of a runaway slave,—a freedom subject to being ended by legal process, it is true, but still having the consequences of freedom while it lasted. The doctrine of the common law, and, in the case of land, the law of this State, at least until St. 1891, c. 354, was that a disseisor got a title, although by wrong, and left only a right of action to the disseisee. See authorities cited in *Miller v. Hyde*, 161 Mass. 472, 480. There is no case to which this doctrine applies with more force than that of the person of a fugitive, in a State which would not have allowed his master to exercise authority here for a week. It is not to be believed that such a person would have been denied the right to maintain the ordinary actions in our courts. *Polydore v. Prince*, Ware, 402. In the case of a slave brought here temporarily by his master it well might be argued that his status remained unchanged, although our decisions looked the other way. Cobb, Slavery, § 278. But when he had escaped and had both power and intent to remain in this jurisdiction and out of the master's hands, it would be giving a preponderance to fiction over fact which this Commonwealth would not have tolerated unless under a decision of the Supreme Court of the United States, if he should have been held subject to all the incapacities of a slave. If he could sue, *a fortiori* he could marry. Whatever effect recapture might have upon the relation, we are of opinion, especially in view of the tenderness and doubt that has been felt even as to the marriage of persons living in actual servitude, that the marriage of a fugitive slave in one of the Northern States of this Union was not to be questioned, so long as actual freedom was maintained. *McDowell v. Sapp*, 39 Ohio St. 558, 563. *Harris v. Cooper*, 31 U. C. Q. B. 182, 197, 200. *Price v. Slaughter*, 1 Cincinnati S. C. Rep. 429. 1 Bish. Marr. Div. & Sep. § 669.

It has been held repeatedly that even a marriage of slaves in a slave State might be ratified by continuing cohabitation after they were freed. *Johnson v. Johnson*, 45 Mo. 595, 601. *McReynolds v. State*, 5 Coldw. 18. 1 Bish. Marr. Div. & Sep. § 665. The conclusion is clearer in a case like the present that a marriage entered into here and continuing after the abolition of slavery is not now to be disturbed.

This is a petition to remove the administrator, not a petition

to revoke the original decree. The petition goes on the single ground that the petitioner is the only legitimate child. We have said enough to show that in our opinion the petitioner has not made out a case for removal on this ground, and we do not mean to intimate that there is ground for revocation. The substantive question whether the petitioner is entitled to share in the distribution of the estate we leave undecided.

Decree affirmed.

FRANCIS C. STANWOOD & another, trustees, vs. MARGARETTE STANWOOD & others.

Suffolk. March 11, 1901. — May 31, 1901.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

Devise, Construction. Trust, Resulting, Powers of trustee.

A devise to the testator's children gives a vested interest unless the will shows a contrary intention.

When by a will real property is given to several persons by name to be shared equally among them, they take as tenants in common and not as joint tenants or as a class, and if one of them dies before the testator his share lapses and does not go to the survivors, unless they are the heirs at law of the testator.

A testator devised all his real estate to a trustee, for the equal benefit of his five children named, who were to receive the net income equally during a certain period, at the termination of which, the trustee was to divide the property held by him under the trust equally among the testator's "said children and their respective heirs and assigns." One of the children died before the testator, and another of them died after the testator but before the time of distribution. *Held*, that the gift was not to the children as a class with right of survivorship, but that the children took a vested interest as tenants in common. Consequently, that the share of the child who died after the testator went to the executor of that child, and that the share of the child who died before the testator lapsed, and was held by the trustee upon a resulting trust for the benefit of the testator's heirs at law.

A testatrix having one son and four daughters devised all her real estate to her son, in trust, to hold, manage and improve the same for twenty years, to distribute the net income equally among all her children, and at the termination of the twenty years to divide the property equally among her children. The will also contained this clause: "And I hereby further authorize and empower my said trustee at any time before the said period of distribution, if he deems it for the best interest of all concerned so to do, to divide the trust property of whatsoever consisting, or the same or any portion thereof to sell at public or private sale and the proceeds to divide equally among my said children and their respec-

tive heirs and assigns, and to terminate this trust." The will, after naming the son as devisee of the residue of the estate in trust, did not mention him again by name as trustee, but gave the powers thereunder to "my trustee," "my said trustee," "such trustee" or "the trustee under the trust." The will contained numerous other powers attached to the trust and not personal to the trustee named in the will. The son died nearly ten years before the testatrix, who died without making any change in her will. Trustees under the will, appointed by the Probate Court, asked for instructions as to their power to divide the property before the expiration of the twenty years, alleging that they deemed it for the best interest of all concerned to make the division, the children being all of age and all but one desiring it. *Held*, that the trustees had the power to make immediate distribution of the property, having, under Pub. Sts. c. 141, § 6, the same powers, rights and duties as if they had been originally appointed. The cases holding, that a power given to the executor of a will cannot be exercised by an administrator *de bonis non* with the will annexed, have no application to this case.

BILL FOR INSTRUCTIONS by Francis C. Stanwood and Francis C. Welch, trustees under the will of Caroline L. Stanwood, late of Boston, filed May 23, 1900.

The case came on to be heard before *Morton, J.*, who, at the request of the parties, reserved it on the bill and answers for the consideration of the full court, such disposition to be made thereof as to that court should seem meet.

The will was dated February 17, 1883. Lemuel Stanwood, son of the testatrix, named therein as sole executor and sole trustee, died February 20, 1888. The testatrix died February 5, 1898. The material provisions of the will and all other material facts are stated in the opinion of the court.

E. W. Hutchins & A. S. Wheeler, for Margarette and Francis C. Stanwood.

J. D. Bryant, for Mary L. Dorr.

A. H. Latham, for Samuel Henshaw.

LATHROP, J. Caroline L. Stanwood, by her will executed in 1883, devised all her real estate to her son Lemuel, in trust to hold, manage and improve the same, and the income thereof to collect and receive for the term of twenty years, unless the trust should be sooner terminated according to the provisions of the will, and from the net rents and profits to pay in semi-annual instalments, but without power of anticipation, to each of her two unmarried daughters, Margarette and Annie M., the sum of \$600 per annum during said term, or during such portion thereof as they or either of them should remain unmarried, and to divide

the remainder of the net income equally between her other children, Mary L. Dorr, Francis C. Stanwood and Lemuel Stanwood, "(and either or both my said daughters Margarette and Annie as may have married before such period of distribution) until each of my said children shall receive the sum of six hundred dollars per annum, and thereupon the remainder of said net income, if any, to divide equally among all my said children. And at the termination of said twenty years to divide the property, real or personal, held by the trustee under the trust hereby created, equally among my said children and their respective heirs and assigns."

The will also contains this clause: "And I hereby further authorize and empower my said trustee at any time before the said period of distribution, if he deems it for the best interest of all concerned so to do, to divide the trust property of whatsoever consisting, or the same or any portion thereof to sell at public or private sale and the proceeds to divide equally among my said children and their respective heirs and assigns, and to terminate this trust." There are other provisions of the will which will be referred to later.

Lemuel Stanwood died February 20, 1888, leaving surviving him no widow, and as his only heir at law and next of kin his mother, Caroline L. Stanwood, to whom, by will, he devised and bequeathed all the residue of his estate.

Caroline L. Stanwood died February 5, 1898, leaving surviving her no husband, and as her only heirs at law and next of kin her children, Margarette Stanwood, Annie M. Henshaw, Mary L. Dorr and Francis C. Stanwood.

Annie M. Henshaw died March 12, 1900, leaving surviving her her husband, Samuel Henshaw, and as her only heirs at law and next of kin her brother and sisters. She left a will, by which she gave all her estate, real and personal, to her husband; and he has been appointed executor of her will.

The petitioners were appointed trustees in place of Lemuel Stanwood, on June 2, 1898.

The income of the estate has been more than sufficient to pay the annuity of \$600 to each one of the children of the testatrix.

The petitioners allege that they deem it for the best interest of all concerned to exercise the power given to the trustee under

the will, and to divide the trust property among those persons entitled thereto, if they have the power to do so.

The questions asked by the trustees are these:

1. What person or persons are entitled to the income of the trust estate now in the petitioners' hands, and in what proportions?

2. Whether any part of the principal of the trust fund is now distributable; and if so, to what persons, and in what proportions?

3. Whether the petitioners have the power to divide the trust property and to determine the trust; and if so, what person or persons are entitled thereto?

1. There can be no question that one fourth of the income which had accrued prior to the death of Mrs. Henshaw is to be paid to her husband as executor of her will.

As to the income which accrued after the death of Mrs. Henshaw, we are of opinion that the gift was not to the children as a class with right of survivorship, but that the children took a vested interest as tenants in common. It is a general rule of construction that a devise to the testator's children gives a vested interest, unless the will shows a contrary intention. *Gibbens v. Gibbens*, 140 Mass. 102. We find nothing in the will before us to show any intent to the contrary. In *Frost v. Courtis*, 167 Mass. 251, the general rule is said to be, "that, when real property is given, as it was here, to several persons by name to be equally divided amongst them, they take as tenants in common, and not as joint tenants or as a class." See also *Horton v. Earle*, 162 Mass. 448; *Bancroft v. Fitch*, 164 Mass. 401; *Shattuck v. Wall*, 174 Mass. 167; *Lyman v. Coolidge*, 176 Mass. 7.

The same rule applies to a bequest of income or of an annuity. *Jones v. Randall*, 1 Jac. & W. 100. *Eales v. Cardigan*, 9 Sim. 384. *Bryan v. Twigg*, L. R. 3 Ch. 183.

It follows that Mr. Henshaw is entitled under his wife's will to one fourth of the income which has accrued since the death of his wife.

2. On the death of Lemuel during the lifetime of the testatrix, the devise to him lapsed, and did not go to the brother and sisters as members of a class. They took the same by descent as heirs of the testatrix. The purpose of the trust as to Lemuel

having failed, the new trustees hold the share of the estate which would have been his had he survived his mother upon a resulting trust for the benefit of the heirs at law. *Easterbrooks v. Tillinghast*, 5 Gray, 17. *Packard v. Marshall*, 138 Mass. 301.

3. The last question is whether the trustees have now the power to terminate the trust, and divide the property, and among whom?

There is no doubt that the will gave to the original trustee ample power to divide the property before the expiration of twenty years if he deemed it for the best interests of all concerned. The present trustees state that they deem it for the best interests of all concerned to make the division. The children are all of age, and all desire this to be done, except Mrs. Dorr. Mrs. Stanwood died nearly ten years after her son Lemuel, whom she had named as trustee under her will. So far as appears, she allowed her will to stand, without making any change in it. She must be presumed to have known that another trustee would have to be appointed, but the powers given remained the same. Without laying stress upon these facts, we find nothing in the will to show that the testatrix intended that the power to divide the estate rested in the personal discretion of the person named by her as trustee. An examination of the will shows that after naming Lemuel Stanwood as the devisee of the rest and residue of the estate in trust, he is not mentioned again by name as trustee, but the power is given to "my trustee," "my said trustee," "such trustee," or "the trustee under the trust." The will contains numerous powers, which are attached to the trust and are not personal to the trustee named in the will. A new trustee by our law has the same powers, rights and duties, as if he had been originally appointed. Pub. Sts. c. 141, § 6. *Nugent v. Cloon*, 117 Mass. 219. *Bradford v. Monks*, 132 Mass. 405. *Wemyss v. White*, 159 Mass. 484, 486.

The cases of *Tainter v. Clark*, 13 Met. 220, and *Greenough v. Welles*, 10 Cush. 571, simply decide that a power given to the executor of a will cannot be exercised by an administrator *de bonis non*. They have no application to the case before us.

It follows that the trustees have the power to divide the property; and that the persons entitled thereto are Margarette Stanwood, Mary L. Dorr, Francis C. Stanwood and Samuel Henshaw, to each one fourth. *Decree accordingly.*

BREWER LUMBER COMPANY *vs.* BOSTON AND ALBANY
RAILROAD COMPANY.

Suffolk. March 11, 1901. — June 1, 1901.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

Sale, Stoppage in transitu, Whether transit has terminated. Payment, Acceptance of promissory note.

The right of stoppage *in transitu* can be exercised as long as the goods are in the hands of the carrier either *qua* carrier or as warehouseman. The transit does not terminate until the goods are in the possession, actual or constructive, of the purchaser, and the purchaser is not in or entitled to possession until he has discharged the carrier's liens, unless the carrier makes an agreement with the purchaser to hold the goods as his bailee or agent.

The rule in Massachusetts, in simple contract debts, is, that a promissory note given by a debtor to his creditor is presumed to be a payment, and the presumption is one of fact, which may be rebutted and controlled by evidence that such was not the intention of the parties. *Semble*, that there is never a presumption that a note is intended to operate as payment in case of the insolvency of the maker before it is negotiated.

The right of stoppage *in transitu* may be exercised in spite of the fact that the vendor has accepted the purchaser's promissory note and receipted his bill for the goods, if he produces the note in court and tenders it to the maker's assignee and trustee in bankruptcy. It is immaterial that the note was indorsed by the plaintiff to a bank for collection or was discounted by the bank, if the plaintiff has the note in his possession at the commencement of the suit and tenders it at the hearing.

REPLEVIN for a car load of lumber sold by the plaintiff to one George A. Paul and claimed by right of stoppage *in transitu*, the action being defended by the trustee in bankruptcy of Paul. Writ dated August 30, 1898.

In the Superior Court the case was tried without a jury before *Richardson, J.*, who found for the plaintiff, and, with the assent of both parties, reported the case for the determination of this court. The terms of the reservation, as well as all the material facts and rulings, are stated in the opinion of the court.

F. Paul, (*F. F. Haskell* with him,) for the defendant.

E. N. Hill, for the plaintiff.

LATHROP, J. This case comes before us in a somewhat unsatisfactory manner. It is a report of a justice of the Superior

Court, before whom the case was tried without a jury. The report sets forth certain facts, certain evidence and requests for rulings by both parties, which were passed upon, and a general finding for the plaintiff, without any findings of specific facts. The report concludes as follows: "Upon the foregoing evidence the court found for the plaintiff, and now, with the assent of both parties, reports the case for the determination of the Supreme Judicial Court, both parties agreeing that if upon the foregoing evidence the rulings and refusals to rule and finding were right, judgment is to be entered for the plaintiff in accordance with the finding; otherwise, judgment is to be entered for the defendant." The word "evidence" is shown by another paragraph in the report to include statements of facts, documentary evidence and testimony of witnesses. As this is an action at law, the only question can be whether the evidence warranted the finding. We have no right, if the testimony of witnesses is conflicting, to decide the case upon a view of the testimony which we might take, if the evidence were before us for our decision.

The action is replevin of a car load of lumber sold by the plaintiff to George A. Paul, a lumber dealer at Boston, and forwarded by the plaintiff over the defendant's railroad from East Saginaw, Michigan, to him. The plaintiff claimed the lumber by reason of the exercise of the right of stoppage *in transitu*; and the action was defended by the trustee in bankruptcy of Paul.

The lumber was sold on January 26, 1898, for the sum of \$678.28, Paul to pay the freight, and to deduct it from the amount of the invoice. The terms of the payment were to be two per cent off for cash, if paid within ten days, or a three months' note from date of invoice. On January 31, 1898, the lumber was duly shipped, consigned to Paul, and the invoice forwarded to him. On February 19, 1898, the lumber arrived at the Huntington Avenue yard of the defendant in Boston, and Paul was notified of the fact by the agent of the defendant, by a postal card, which, in addition to the notice of the arrival of the car, contained the following: "If not unloaded within ninety-six hours from February 19, six o'clock P. M. of this date, Sundays and legal holidays not included, the freight will

be subject to storage charges, as per rules of the Massachusetts and the New Hampshire Car Service Association." On March 4, 1898, the defendant stored the lumber in one of its sheds at its Huntington Avenue yard, and notified Paul of the fact. On March 10, 1898, Paul sent a promissory note for \$300, dated the same day, and payable to the plaintiff's order at any bank in Boston. This note was indorsed by the plaintiff payable to order of Second National Bank, and under the name of the plaintiff were the letters "B. D." This note was protested on June 10, 1898. On March 11, 1898, the plaintiff sent a letter to Paul, stating that it had placed the \$300 note to his credit, and calling his attention to the fact that the date of the note, March 10, was not in accordance with the contract, which called for a three months' note from the date of the invoice, and requested a settlement for the balance. On March 26, 1898, Paul sent the plaintiff a promissory note for \$313.68, dated that day, and payable to the order of the plaintiff at any bank in Boston. This note was indorsed in the same way as the other, and it was protested on June 28, 1898.

These notes, the report states, were sent to the plaintiff in payment for the full value of the lumber, with interest added from the date of the invoice to the dates of the notes, less freight, which was to be deducted from the amount of the invoice. On receipt of the second of the notes, the plaintiff sent to Paul a statement of account, dated January 31, 1898, stating the terms of sale, the items of the lumber, and the amount due less freight, being \$607.61. Across the face of the paper was written "Received settlement as follows:—

" 3 mos. note from March 10 /98	\$300.00
" 3 mos. " " " 28 /98	313.68
	<hr/>
	613.68 "

This paper also contained a request for the freight receipt, which was not sent, nor was the freight paid by Paul.

On April 9, 1898, Paul made a common law assignment of all his property for the benefit of his creditors, and the assignee accepted the trust. The plaintiff was notified of the assignment, and a representative of the plaintiff attended the first meeting of

Paul's creditors. On April 16, 1898, the plaintiff gave notice to the defendant not to deliver the lumber to Paul, and requested the defendant to keep it on storage for it, claiming the right of stoppage *in transitu*.

On July 27, 1898, the plaintiff's attorney tendered the notes of March 10 and March 28 to Paul's assignee, who refused to receive them; and at the trial of this case they were again tendered and refused.

This action was brought on August 30, 1898, and before obtaining the lumber the plaintiff was obliged to pay the defendant its claim for freight and storage.

We find it unnecessary to state the testimony of witnesses at this point, though we shall refer to some of it hereafter.

There being no contention that Paul was not insolvent, the principal questions of law in the case are whether the transit had ended, and what the effect was of giving and receiving the notes.

1. As to the first question, we are of opinion that the transit was not ended when the plaintiff asserted its right to the lumber. It makes no difference whether the goods are in the hands of the carrier *qua* carrier, or whether he puts them at the journey's end in a warehouse. In other words, the transit does not terminate until the goods arrive in the possession actual or constructive of the purchaser. *Seymour v. Newton*, 105 Mass. 272, 275. *Mohr v. Boston & Albany Railroad*, 106 Mass. 67. *Durgy Cement & Umber Co. v. O'Brien*, 123 Mass. 12. *Inslee v. Lane*, 57 N. H. 454. So long as the carrier or a warehouseman acting for him is in possession of the goods, he has a lien for the freight or other charges. The purchaser is not in possession or entitled to possession until he discharges the liens, and the right of stoppage *in transitu* remains. See Benjamin on Sales, (7th Am. ed.) 915, (2), and cases cited.

While the position of the carrier may be changed to that of bailee or agent for the purchaser of the goods, yet that is a question of an agreement between the carrier and the purchaser. *Jackson v. Nichol*, 5 Bing. N. C. 508. *James v. Griffin*, 2 M. & W. 623. *Ex parte Barrow*, 6 Ch. D. 783. *Ex parte Cooper*, 11 Ch. D. 68. *Kemp v. Falk*, 7 App. Cas. 573, 584. *McLean v. Breithaupt*, 12 Ont. App. 383. *Calahan v. Babcock*, 21 Ohio St.

281. *Jeffris v. Fitchburg Railroad*, 93 Wis. 250. *Symms v. Schotten*, 35 Kans. 310.

In the case before us an attempt was made by the trustee in bankruptcy to show that such an agreement was made, but the testimony of Paul falls far short of this. He testified that within a few days after receiving the postal card of February 19, he telephoned to the defendant to store the lumber. He was then asked, "What did they say to you?" and his answer was: "'All right,' or something to that effect." He was then asked, "Will you say that they said anything?" and answered: "They probably said, 'All right.' They might say, 'Yes, all right,' or something like that." He was again asked, "What did they say?" and answered, "I don't know." On re-direct examination he testified that he did not know whether he received any reply to his telephone message, and, in answer to the next question but one, testified that he did receive a reply. It seems to us that the judge might well disregard this testimony as too uncertain and vague for consideration. But if it was to be taken into consideration, the testimony of Turner, the freight agent of the defendant in charge of the Huntington Avenue yard, was contradictory to that of Paul. He testified that he remembered the car of lumber, and stored it in the ordinary course of business; and that he received no directions from any one to store it. If the testimony of Paul can be said to contradict this, it was for the judge sitting without a jury to decide what the fact was.

We are therefore of opinion that the judge rightly refused to rule, as requested by the defendant, that the plaintiff had lost the right of stoppage *in transitu*, or had not seasonably exercised that right.

It follows, from what we have said, that the third ruling given at the request of the plaintiff was correct. This ruling was as follows: "The storage of the lumber in question by the defendant, whether according to the custom of storing after the expiration of the limit of time set forth in the notice given by the defendant to the consignee, or in accordance with the notice to store given by the consignee, does not terminate the transit, without evidence of the attornment by the defendant to the consignee, or an agreement to hold as the agent of the consignee."

The fourth ruling given was as follows: "The existence of the defendant's lien for the unpaid freight raises the presumption that the defendant continued to hold the merchandise as carrier, and in order to rebut this presumption there must be some proof of some agreement or arrangement between the defendant and Paul, whereby the defendant, while retaining its lien, became the agent of Paul to keep the goods for him."

While we do not think that this ruling is well expressed, we are of opinion that no harm was done in giving it. We have already stated the law bearing on this subject, and need not repeat it. The undisputed facts in the case showed that the defendant was holding the lumber for the freight and other charges; and it made no difference whether the goods remained in the car or in the warehouse, unless there was proof of some agreement or arrangement, whereby the defendant became the agent of Paul. Taking the ruling as a whole, we are of opinion that it means no more than this.

2. The next question is as to the effect of the giving of the notes. The instructions requested by the defendant on this point are the first and second, and are as follows:

"1. If the consignee, intending to pay for the lumber according to agreement, gave to the plaintiff his negotiable promissory notes, dated at Boston, Mass., and payable on time at said Boston, and thereupon the plaintiff receipted its bill for the lumber, and there was no agreement that said notes were accepted as conditional payment, then the law presumes that such notes were given and accepted as absolute payment, and in that case the plaintiff is not an unpaid vendor and has no further right on the lumber, and must seek his remedy on the notes.

"2. The notes constituted a contract to be construed according to the law of Massachusetts. It is the law of Massachusetts that a negotiable promissory note, given in payment of an obligation, is to be deemed to be given and taken as absolute payment of such obligation in the absence of evidence that the parties intended it to operate only as a conditional payment."

On these requests the judge ruled "that while the rules of law in the 1st and 2d requests were correct as general statements, they did not, on the evidence, require a finding for the defendant."

The rule in Massachusetts, in simple contract debts, is that a promissory note given by a debtor to his creditor is presumed to be a payment; that the presumption is one of fact and not of law, which may be rebutted and controlled by evidence that such was not the intention of the parties.

In *Curtis v. Hubbard*, 9 Met. 322, 328, it is said by Chief Justice Shaw: "The rule adopted in Massachusetts, that a negotiable promissory note, given for a simple contract debt, shall be deemed payment, is to be taken with considerable qualification. It is founded on the consideration, that when a note is given for goods, even if it is not negotiated, it is equally convenient to the creditor (and generally more so) to sue on the note, as on the original consideration, and so there is no reason for considering the original simple contract as still subsisting and in force; and therefore a presumption arises, that it was intended by the parties that the note should be deemed a satisfaction. But this is a presumption of fact, which may be rebutted by evidence showing that it was not so intended; and the fact, that such presumption would deprive the party who takes the note of a substantial benefit, has a strong tendency to show that it was not so intended."

In a late case the reason of the rule was stated to be for the protection of the debtor, who might otherwise be compelled to pay both the note and the debt, and it is further said: "But full protection is given to him if, in the proceedings to enforce the original debt, it is shown that he has not paid the note, and that it is then owned by the creditor, and if it is surrendered in court for the benefit of the maker." *Davis v. Parsons*, 157 Mass. 584, 588.

It is obvious that the rule can have little or no application, where a person has a lien, which is a valuable right, and that the court would be slow to deprive a lien creditor of the right to enforce his claim on the ground that he had taken a worthless negotiable promissory note, where the note was produced at the trial and tendered to the maker or to his representative, whether the above-mentioned reasons for the rule are the final ones or not.

Thus in *Arnold v. Delano*, 4 Cush. 33, a vendor's lien at common law was enforced, notwithstanding a promissory note was given, and also a receipt for the price; and it was said by

Chief Justice Shaw that a lien for the price is incident to the contract of sale; that when a credit is given, the vendee has a right to take possession of the goods, and if he does so the lien is gone. It was then added: "But the law, in holding that a vendor, who has thus given credit for goods, waives his lien for the price, does so on one implied condition, which is, that the vendee shall keep his credit good. If, therefore, before payment, the vendee become bankrupt or insolvent, and the vendor still retains the custody of the goods, or any part of them; or if the goods are in the hands of a carrier, or middleman, on their way to the vendee, and have not yet got into his actual possession, and the vendor, before they do so, can regain his actual possession, by a stoppage *in transitu*; then his lien is restored, and he may hold the goods as security for the price." In respect to the contention that the note was payment, it was said: "We think the answer is, that a promissory note, even if in form negotiable, whilst it remains in the hands of the vendor and not negotiated, but ready to be delivered up on the discharge of the lien, is regarded as the evidence in writing of a promise to pay for the goods purchased, and does not vary the rights of the parties."

If this is true of a vendor's lien, it is equally true of the right of stoppage *in transitu*, which is merely an extension of the vendor's lien. *Grout v. Hill*, 4 Gray, 361, 366, per Shaw, C. J. See also 1 Pars. Mar. Law, 340, and cases cited in n. 2.

In *Seymour v. Newton*, 105 Mass. 272, the goods were to be paid for by a draft at three days' sight. The draft was accepted but was not paid, and it was held that neither the acceptance of the draft, nor the sending to the purchasers of an account, in which they were credited with the draft, prevented the plaintiffs from stopping the goods *in transitu*. To the same effect is *Mohr v. Boston & Albany Railroad*, 106 Mass. 67. See also *Re Batchelder*, 2 Lowell, 245, 248.

There is some contention on the part of the trustee in bankruptcy that the notes were negotiated. There was no evidence in the case to show the meaning of the letters "B. D.," and the fact that the notes were indorsed by the plaintiff to the order of the Second National Bank is not important. Whether they were sent to that bank for collection or were discounted by it is immaterial. They were not paid by Paul, and were tendered by

the plaintiff to the common law assignee, and to the trustee in bankruptcy. The facts that the plaintiff was then in possession of the notes and tendered them is all that is required. *Davis v. Parsons*, 157 Mass. 584, 588.

It follows that the second ruling requested by the plaintiff, as modified by the judge, was rightly given. This ruling so modified was as follows: "That the giving of the two notes in payment for the lumber according to the agreement, while in form negotiable does not prevent the right of stoppage *in transitu*, as they remained in the hands of the vendor, and ready to be delivered up."

Nor do we regard it of importance that on receipt of the last note the plaintiff sent to Paul a statement of the account between them. The report does not show that this statement was signed by the plaintiff. But, if it were so signed, the case would stand no stronger for the defendant than if the statement had been "Received payment by two notes." Then the case would have fallen within the case of *Arnold v. Delano*, 4 Cush. 33, 34. See also *Seymour v. Newton*, 105 Mass. 272, 273.

Judgment for the plaintiff.

HENRY H. SYLVESTER & others vs. GEORGE H. WEBB
& others.

Plymouth. May 23, 1901. — June 1, 1901.

Present: HOLMES, C. J., KNOWLTON, LATHROP, BARKER, & HAMMOND, JJ.

Contract, Validity. Municipal Corporation, Officers and Agents. Agency, Ratification.

A contract for the building of a schoolhouse, made by a town with a contractor, who is also one of the building committee of the town and by his vote created the majority which accepted his bid, if free from fraud and corruption, is not void as against public policy.

If an honest contract to build a schoolhouse, made by a town with a contractor who is also one of its building committee and by his vote created the majority which accepted his bid, is voidable on the ground that the agent contracted with himself, the facts, that the circumstances became fully known to the inhabitants and were discussed and voted upon at two special town meetings without any repudiation of the contract, are sufficient to warrant a finding that the town had ratified the act of the committee.

BILL IN EQUITY by ten taxpayers of the town of Scituate, to restrain the members of a committee appointed by the town to build a new schoolhouse, the treasurer of Scituate, and the inhabitants of that town, from carrying out a contract with Thomas F. Bailey and Son, for building a new schoolhouse in the town, and from paying any money on account of the contract, filed November 5, 1900.

At the trial in the Superior Court, before *Braley, J.*, without a jury, it appeared, that at the time the contract was made Thomas F. Bailey, one of the contractors, was a selectman and one of the building committee of the town of Scituate, and by his vote in the committee made a majority of one accepting the bid of Thomas F. Bailey and Son to build the schoolhouse, that firm consisting of himself and his son, and their bid not being the lowest.

The plaintiffs asked for a ruling, that the contract made by the committee with Thomas F. Bailey and Son was void as against public policy. The judge refused so to rule, and made the following findings: That the town had not exceeded the limit of its indebtedness; that it had duly accepted the gift of Emeline S. Jenkins [to give land and money for the schoolhouse]; that the town had ratified the action of the committee appointed to complete the schoolhouse, and appropriated sufficient money to cover the contract made by the committee; that the action of the committee and of Thomas F. Bailey in the making of the contract was not corrupt; and that there was no intention on the part of any of the parties to act otherwise than for the best interests of the town. He made a decree dismissing the bill, and, at the request of the plaintiffs, reported the case for the consideration of this court, such decree to be entered as law and justice might require. The facts appearing by the report are stated in the opinion of the court.

W. C. Cogswell, for the petitioners.

H. H. Pratt, for Webb and others.

R. O. Harris, for the respondent Bailey.

BARKER, J. It appears from the report that the building of a new schoolhouse was determined upon in the town of Scituate, and at a special town meeting held on June 2, 1900, a building committee was raised consisting of the three selectmen, the

three members of the school committee, and three other persons, nine in all. A Mrs. Jenkins of Boston had proposed to make a gift to the town of the lot on which the schoolhouse was to be built, and she afterwards added a gift of the sum of \$5,000 toward the cost of the building.

The building committee advertised for proposals which were opened on October 15, 1900. One of the selectmen, and so a member of the building committee, the defendant Thomas F. Bailey, was also a carpenter and builder, pursuing that business under the firm name of Bailey and Son, in partnership with George Bailey his son. There were five bids, the lowest of which was by the plaintiff Sylvester, and the next higher was by Bailey and Son, the price offered by Sylvester being the lower by the sum of \$123. By votes of five to four, Thomas F. Bailey being one of the five, the building committee voted not to accept the proposal of the lowest bidder, and to award the contract to Bailey and Son, and authorized their chairman to sign the agreement for the committee. A contract was so signed on the next day by the defendant Webb, chairman, in behalf of the committee and by Thomas F. Bailey for Bailey and Son. The offer of Mrs. Jenkins to give the \$5,000 seems to have been made in an interview between her and the chairman Webb, in which he submitted the bids to her. Webb testified that he voted to give the contract to Bailey and Son because he understood Mrs. Jenkins to wish them to have the contract.

The committee awarded the contract on October 29, 1900. At the special town meeting of June 2, the town had passed a vote authorizing its treasurer to borrow a sum not to exceed \$14,000, for the erection of the schoolhouse. Bailey and Son's bid was \$16,466 and did not include the apparatus for heat and ventilation, the bids for which were separate, and were for over \$1,600. The bill in this cause was sworn to on November 5, 1900. A special town meeting was held on December 4, 1900, at which the town voted to accept the deed of Mrs. Jenkins which had been made on November 1 and her agreement of the same date to make the gift of \$5,000, and also voted to authorize the building committee to make a contract or contracts not to exceed \$20,000 for the erection and completion of the building and for furnishing the same, and grading the grounds, and also

to authorize the treasurer to borrow the sum of \$15,000 for the purpose.

Hearings of this bill were going on in court, and another special town meeting was held on December 27, 1900, at which the town again considered matters connected with the contract and the action of the building committee. At this meeting the town voted not to purchase from Bailey and Son the material for which they had contracted in order to carry out their contract with the committee. An article, to see whether the town would compromise and settle Bailey and Son's claim, was passed over. The committee were instructed to award the contract for completing the schoolhouse to the plaintiff Sylvester, provided he should make a satisfactory settlement with Bailey and Son of their claim. An article, to see if the town would authorize the committee to make a contract or contracts not to exceed \$21,000 for the erection of the schoolhouse, was passed over. It was voted to award the contract for heating and ventilating to the lowest responsible bidder. An article, to see if the town would instruct the committee to complete the building with workmen employed by the day, or give the committee other instructions, was passed over, and the treasurer was authorized to borrow a sum not exceeding \$21,000 inclusive of any sum before authorized for the purpose of erecting and completing the building, and furnishing the same and grading the grounds.

Sylvester was unable to make a settlement with Bailey and Son, and the hearings of the case went on after this last special town meeting, with the result that the judge who heard the case found that the town had not exceeded the limit of indebtedness, that it had duly accepted the gift of Mrs. Jenkins, had ratified the action of the committee and appropriated sufficient money to cover the contract made by the committee, and that the action of the committee and of Thomas F. Bailey in the making of the contract was not corrupt, and that there was no intention on the part of any of the parties to act otherwise than for the best interests of the town. The only question finally raised in the lower court by the plaintiffs was that the contract made by the committee with Bailey and Son, Thomas F. Bailey being one of the contracting firm and one of the committee, was void as being against public policy. The presiding judge re-

fused so to find and rule, and entered a decree dismissing the bill, and reported the case for the determination of this court.

Such statutes as we have looking directly to the prevention of corruption in contracts affecting public interests are of comparatively recent date.

An Act of 1854 required all contracts made by county commissioners for public works to be made in writing after due notice for proposals had been published in some newspaper. St. 1854, c. 206. Gen. Sts. c. 17, § 23. Pub. Sts. c. 22, § 22. St. 1897, c. 137, § 2. St. 1900, c. 119.

In the year 1862 all officers or agents of the State or of any city, town or public institution were forbidden under a penalty to receive for themselves or for any other person any commission, discount, bonus, present or reward on purchases or contracts. St. 1862, c. 101. Pub. Sts. c. 205, § 11; c. 27, § 111.

In the year 1872 all officers connected with any prison, house of correction, lunatic hospital or other public charitable institution were forbidden to be concerned or interested directly or indirectly in any contract, purchase or sale made on account of any of said institutions. St. 1872, c. 282. Pub. Sts. c. 205, § 13.

In the same year a similar provision forbade city officials to be interested in a private capacity either directly or indirectly in certain contracts or agreements in which the city is an interested party. St. 1872, c. 274. Three years later the prohibition was made more general as to city officials, and was extended to certain State officers as to contracts and agreements in which the State is interested. St. 1875, c. 232. Pub. Sts. c. 205, § 12.

In the year 1893 county officers were placed under a similar prohibition. St. 1893, c. 271, § 1. By the same statute a penalty was imposed upon them for taking any commission, discount, bonus, present or reward. St. 1893, c. 271, § 2.

The omission of the Legislature to include in these prohibitions one forbidding town officials to have a private interest in contracts in which their towns are interested, is significant. Massachusetts towns have been usually communities most of whose members are well known as to their walk and conduct by their fellows. Town officials have usually been men of probity and good reputation. The business which they have to do for

their towns is not ordinarily of a kind or an amount which subjects the officer to great temptation, and all his acts are so much within the knowledge of other men that any fraud or corruption, while petty in its gains, is likely to be speedily known, and to bring loss of esteem and quick disgrace. In the very small towns such a prohibition might cause inconvenience in the transaction of the public business. It is to the credit of our people that the Legislature has not found it necessary to forbid town officers to have a private interest in contracts or purchases made for the town. It is because they may be counted upon to make none but fair and honest deals with themselves or others that the prohibitions imposed upon city, county and State officials have not been extended further.

This shows that the contract now in question was not made void as against public policy merely by the fact that one of the committee was also the contractor to build the schoolhouse. As to any actual fraud or corruption, that has been negatived by the finding of the court after full hearing. If upon general principles of the law of agency the contract was voidable by the town, it appears that after it was made all the circumstance became fully known to the inhabitants and were discussed and voted upon in two special town meetings. Certainly the principal has not repudiated the contract upon finding that its agent had a private interest in it. The finding of the court is that the contract has been ratified. The general purpose of the contract is one for which the town has an unquestioned right to raise and expend money. The contract itself is not void because one of the committee which acted for the town has a private interest in it, nor has it been found tainted with fraud or corruption. Therefore the case is not one in which the plaintiffs have a right to relief under the statute. Such bills can be brought only when the town votes to raise or to pay money for a purpose other than those for which it has the legal right and power. Pub. Sts. c. 27, § 129. St. 1898, c. 490. They cannot be maintained under the general equity jurisdiction of the courts. *Steele v. Municipal Signal Co.* 160 Mass. 36. See also *Baldwin v. Wilbraham*, 140 Mass. 459; *Prince v. Crocker*, 166 Mass. 347, 358.

Decree dismissing bill affirmed.

JONATHAN B. DIXON vs. NEW ENGLAND RAILROAD
COMPANY.

Suffolk. November 23, 1900. — June 4, 1901.

Present: HOLMES, C. J., KNOWLTON, BARKER, HAMMOND, & LORING, JJ.

Evidence, Declarations of deceased person, Rules of railroad company competent, how proved, Materiality of good faith. *Carrier*, Of passengers. *Railroad*, Nature of ticket, Duties of conductor. *False Imprisonment*, General denial. *Pleading*, In tort, Justification, General denial. *Practice*, Civil, Exceptions, Rulings.

On an exception to the admission of the declarations of a deceased person under St. 1898, c. 535, if it appears that the declarant was dead at the time of the trial, the admission of the evidence shows that the presiding judge was satisfied that the declarations were made in good faith before the beginning of the suit and upon the personal knowledge of the declarant.

In an action by a passenger against a railroad company for alleged unlawful arrest of the plaintiff on the charge of evading the payment of fare, evidence of the rules of the defendant as to punching tickets and as to allowing passengers to stop over and the use of stop-over checks is admissible.

Rules of a railroad company in regard to the collection of tickets are not records and are sufficiently identified if it is shown that they were issued by those who conduct the business of the company for the government of its servants. The sufficiency of identification is a question for the presiding judge upon which his finding is conclusive, unless all the evidence is reported and the finding is not warranted by it.

It is not correct to say, that a railroad ticket is only a symbol of the contract between the company and the passenger and a piece of evidence showing what the real contract is. A railroad ticket may be more than a symbol, and it may not show what the real contract is. Per BARKER, J.

A request for a ruling sound in law should be refused if upon the evidence as it stands the ruling would have a tendency to mislead the jury.

A passenger may have a right to transportation between two stations on a railroad because of his purchase of a certain ticket, and yet if the ticket itself is not in order, a conductor is not bound to take it in payment of fare.

In an action by a passenger against a railroad company for alleged unlawful arrest of the plaintiff on the charge of evading the payment of fare, it appeared, that the plaintiff, without obtaining a stop-over check, got off at a station after his ticket, which entitled him to travel to a station beyond, had been punched twice by the conductor. He took the next train to continue his journey and offered the same ticket which the conductor of that train refused to accept. It was shown, that, under the rules of the railroad, the punching of the ticket twice by the first conductor cancelled it and made it unreceivable for passage on another train. *Held*, that on these facts it was right to instruct the jury, as matter of law, that under the circumstances the ticket was not good for the plaintiff's passage on that train at that time, and that it was not a ticket that the conductor was obliged to take in payment of fare.

In an action by a passenger against a railroad company for alleged unlawful arrest of the plaintiff by a police officer at the request of a conductor of the defendant, on the charge of evading the payment of fare, the defendant introduced evidence that the conductor, having come with the plaintiff into the presence of the police officer, demanded payment of the fare, which the plaintiff refused in the police officer's presence, that the police officer examined the ticket and said it was not good because it was punched, that the conductor then again demanded payment of the fare, which the plaintiff again refused, and that the police officer thereupon arrested the plaintiff. The plaintiff asked for a ruling, that the question of the good faith of the police officer in making the arrest, as testified to in the case, was not an element to be considered by the jury in determining the case. This ruling was refused. *Held*, that the refusal was right. The jury could find that the conductor did not himself assault or arrest the plaintiff and that his words and acts were not a direction to make the arrest, but a demand that the officer should exercise the jurisdiction which the statute had given him, and that the officer made the arrest upon his own authority and judgment in view of what he himself had seen and heard, and upon this aspect of the case the good faith of the officer and his belief, that a fraudulent evasion of fare had been consummated under his own eyes, could not be said to be immaterial. *Held, also*, that although the answer in this case was a general denial and did not set up the defence of a justification, which always must be pleaded, yet the evidence above stated in regard to the acts of the police officer was admissible, not merely in mitigation of damages, but could be considered upon the question whether the arrest was the act of the police officer alone, and, if this was found by the jury to be the fact, it was a defence, because in that case the allegations that the wrongs were done by the defendant and its officers were not proved.

In an action for trespass to the person, where assault and unlawful arrest and imprisonment are alleged, and the defence is a general denial not setting up a justification, whether the allegation in the declaration that the arrest and imprisonment were unlawful makes it an issue whether the arrest if proved was unlawful, *quere*.

A general exception "to the foregoing instructions" following nearly four printed pages of a judge's charge, dealing with different aspects of the case, in which no error was called to the attention of the judge at the trial, must be overruled.

TORT for an alleged assault upon and unlawful arrest and imprisonment of the plaintiff on July 28, 1896, at Waterbury, in the State of Connecticut. Writ dated September 14, 1896.

At the trial in the Superior Court, before *Bond, J.*, the jury returned a verdict for the defendant, and the plaintiff alleged exceptions, which are described in the opinion of the court as also are the evidence and rulings to which they relate.

S. K. Hamilton, for the plaintiff.

C. F. Choate, Jr., for the defendant.

BARKER, J. The plaintiff after having ridden upon one of the defendant's passenger trains from Bristol, Connecticut, to Waterbury was there arrested for fraudulent evasion of fare,

and brought this action. The declaration alleges that the defendant by its agents, officers and servants assaulted the plaintiff, caused him to be arrested and imprisoned wrongfully and unlawfully and kept him so imprisoned and deprived of his liberty for the period of twenty-four hours. The answer denies each and every allegation of the declaration.

The defendant was operating a line from Boston to the State of New York formerly owned and operated by the New York and New England Railroad Company. On July 27, 1896, according to the plaintiff's testimony he bought of a broker at Boston a ticket which had been issued by the New York and New England Railroad Company which read "from Waterbury to Hartford", and then bought at the defendant's Boston station a ticket from Boston to Hartford, upon which he rode from Boston to Willimantic where he left the train and remained during the night. He testified that on leaving Boston the conductor punched twice the ticket on which the plaintiff was riding, and that he received no stop-over check. On the next morning he was carried from Willimantic to Hartford on the same ticket, and then continued his journey from Hartford on the same train with a different conductor. After leaving Hartford he tendered to the conductor the ticket reading "from Waterbury to Hartford" and the conductor punched it twice and placed it in the back of the seat in front of the plaintiff. At Bristol, a station between Hartford and Waterbury, he left the car and stopped until the next train. Whether he notified the conductor that he wished to stop at Bristol was in dispute. He took the next train for Waterbury and when asked for his fare tendered the same ticket on which he had ridden from Hartford. The conductor declined to accept the ticket on the ground that it had been used all the way between Hartford and Waterbury. This the plaintiff denied, and explained the circumstances, but the conductor refused to accept the ticket and notified the plaintiff that he must pay his fare or the conductor would have him arrested, stating that the ticket would be good if not twice punched, and that it would have been good to stop-off on at Bristol if he had asked for a stop-over check. Several times before arriving at Waterbury the conductor asked for the fare and the plaintiff tendered the ticket and the conductor re-

fused to accept it and said that if the plaintiff would not pay his fare he would have him arrested. The evidence as to the arrest was conflicting. The plaintiff testified that upon the arrival of the train at Waterbury the conductor touched him on the shoulder or arm and said in substance "Come with me," and that the plaintiff went with him to the platform, where the conductor turned him over to a policeman, saying "Take this man in charge."

There was no dispute that Dean, a policeman, arrested the plaintiff without a warrant, and took him to the station house, where he was locked up from one to three hours when he was released on bail, and upon the next day he was arraigned in the city court upon a complaint for fraudulent evasion of fare, upon which he was tried and acquitted.

The conductor in his testimony gave a different account of the arrest from that given by the plaintiff. He denied touching the plaintiff, or beckoning the plaintiff to come with him, and testified that after he had helped the passengers to the platform at the station, the plaintiff was standing at his right, possibly six feet away; that the plaintiff spoke to him, and said he would go with him; that the conductor said "all right," he would see if he could find a place for him. "We walked through the depot, and just on the opposite side a policeman was standing, and I spoke to him and I told him that this gentleman refused to pay his fare, and before him I demanded his fare from Bristol to Waterbury. Mr. Dixon says 'And before you I offer this ticket to the conductor for my fare from Bristol to Waterbury.' The policeman took the ticket and looked at it, and said 'That ticket isn't good.' This was stated in the presence of Mr. Dixon. Mr. Dixon said 'Why?' and he said, 'Because it is punched.' I asked him for his fare again, and he refused to give it. I told the policeman that I demanded his arrest for his fare from Bristol to Waterbury, which was thirty-seven cents, and that if he would pay the thirty-seven cents, to let him go. The policeman told Mr. Dixon, 'You will have to go with me.' He made some hesitation, but the policeman got him and took him by the arm, and they walked on."

There was evidence of the defendant's rules and customs as to punching tickets, and as to allowing passengers to stop over and

the use of stop-over checks, and also as to whether the defendant was bound to honor tickets issued by the New York and New England Railroad Company, and as to its customs and instructions upon that subject.

Sections 1591, 3541 and 3607 of the General Statutes of Connecticut, making it a penal offence fraudulently to evade payment of a railroad fare, were in evidence, as also section 2002 requiring police officers and others in their respective precincts to arrest without previous complaint and warrant any person for any offence within their jurisdiction, when the offender shall be taken or apprehended in the act or on the speedy information of others.

The first exception argued was to the admission of declarations of Dean that he had arrested the plaintiff for evading his fare, and that he, Dean, heard the conductor in his presence demand fare of the plaintiff at the station and the plaintiff refuse to pay, tendering his ticket. There was evidence that Dean was dead at the time of the trial. The admission of the evidence shows that the presiding judge was satisfied that the declarations were made in good faith and upon Dean's personal knowledge and before the beginning of the suit. Evidence of them was therefore admissible. St. 1898, c. 535. *Brooks v. Holden*, 175 Mass. 137.

Another exception was to the reading of certain extracts from the defendant's rules. The rules were admissible in evidence. *O'Laughlin v. Boston & Maine Railroad*, 164 Mass. 139, and cases cited. Such rules are not records and are sufficiently identified if it is shown that they are issued by those who conduct the business of a common carrier for the government of its servants. The sufficiency of identification is a question for the presiding judge upon which his finding is conclusive, unless all the evidence is reported and the finding is unwarranted by it. *Gorton v. Hadsell*, 9 Cush. 508, 511. *Commonwealth v. Russell*, 160 Mass. 8. Here the bill does not purport to state all the evidence upon this question, but does state enough to show that the judge was warranted in his finding, and that the exception must be overruled.

The other exception to the exclusion of evidence has been waived.

The remaining exceptions are to the refusal to give certain requests, and a general exception to a part of the charge set out in the bill.

The first request was "That a ticket which a railroad company sells to a passenger is not a contract between the company and the purchaser, but is only a symbol thereof and a piece of evidence showing what the real contract is."

A railroad ticket may be more than a symbol, and it may not show what the real contract is. The only ticket which was in question was the one, not issued by the defendant, and not sold by the defendant to any one, and bought by the plaintiff of a broker. If all the propositions of the request had been sound in law, to have given it as an instruction upon the evidence as it stood would have tended to mislead the jury, and it was properly refused.

The second request was "That in this case, in view of the testimony given by the president of the road in his deposition, the fact that the ticket offered by Mr. Dixon was accepted by the conductor between Hartford and Bristol and punched by him without objection, and the testimony of the conductor between Bristol and Waterbury that the ticket, if it had not been punched twice, was a good ticket, it becomes a question of fact for the jury whether the possession of said ticket by the plaintiff, purchased by him in good faith, entitled him to a ride between Bristol and Waterbury." This request was refused, and in the part of the charge excepted to the jury were told in effect that as matter of law under the circumstances the ticket was not good for the plaintiff's passage upon that train at that time, and that it was not a ticket that the conductor was obliged to take in payment of fare.

The refusal of the request and the ruling given were right. Upon the undisputed evidence the punching of the ticket twice by the first conductor to whom the plaintiff tendered it after leaving Hartford cancelled the ticket and made it not good for passage upon another train. A passenger may have a right to transportation between certain stations because of his connection with a certain ticket; and yet if the ticket itself is not in order, a conductor is not bound to take it in payment of fare. *Bradshaw v. South Boston Railroad*, 185 Mass. 407, 409. *Murdock v. Boston*

of Albany Railroad, 137 Mass. 293, 297, 298. See also *Coleman v. New York & New Haven Railroad*, 106 Mass. 160, 173, 175, 178. As was said in *Bradshaw v. South Boston Railroad*, *ubi supra*, it would often be impossible for a conductor to ascertain and decide upon the right of a passenger except in the usual simple and direct way. The passenger's right to transportation is no greater than the right and duty of the conductor to enforce reasonable rules; and for the time being the passenger must bear the burden which results from his failure to have a proper ticket. The present plaintiff was furnished all the transportation to which he claimed the right, and the questions upon trial were those growing out of his arrest after he had completed his journey.

The exception to the refusal of the third request "that under the law of Connecticut the arrest of the plaintiff by the conductor, if made, or by the police officer as testified to, was an unlawful arrest," and also the exception to the refusal of the fourth request "that under the law of Connecticut it is a question of fact for the jury to determine whether said arrest was unlawful or not," have been waived by the plaintiff's brief, upon the ground that the requests were sufficiently covered by the charge.

The fifth request "that if the jury find that the conductor touched the plaintiff upon his person and said to him 'Come with me', that would constitute an arrest" was given as an instruction to the jury.

The sixth request was "That the question of the good faith of the police officer in making the arrest of Mr. Dixon, as testified to in this case, is not an element to be considered by the jury in determining the case."

The plaintiff concedes that if the action were against the police officer he might prove that he acted in good faith and believed he was doing his duty. But he contends that because his action is against the railroad company because it caused the plaintiff to be arrested, the good faith and honest belief of the police officer were immaterial. Such was not, however, the only aspect of the case. Upon the evidence introduced on the part of the defendant there was no arrest by the conductor, and no direction on his part to the police officer to make the arrest.

The jury could find that the conductor did not himself assault or arrest the plaintiff and that his words and acts were not a direction to make the arrest, but a demand that the officer should exercise the jurisdiction which the statute had given him, and that the officer made the arrest upon his own authority and judgment in view of what he had himself seen and heard. Upon this aspect of the case the good faith of the officer and his belief that a fraudulent evasion of fare had been consummated under his own eyes could not be said to be immaterial.

The seventh and last request was that "This being an action in trespass and the only answer the general issue or denial, the facts of the assault, arrest and imprisonment are the only ones in issue, and any evidence given by the defendant in justification or explanation is allowable only in mitigation of damages." There is no doubt that the defence of a justification is not open under a general denial. *Snow v. Chatfield*, 11 Gray, 12. *Levi v. Brooks*, 121 Mass. 501, 505. *Cooper v. McKenna*, 124 Mass. 284. *Hathaway v. Hatchard*, 160 Mass. 296. *Lambert v. Robinson*, 162 Mass. 34. Whether the unnecessary allegation in the declaration that the arrest and imprisonment were unlawful made it an issue whether the arrest if proved was unlawful we do not decide. See *St. John v. Eastern Railroad*, 1 Allen, 544, 545. The request was properly refused because it was too broad. If the arrest was proved, and at the trial it was conceded, still the evidence given on the part of the defendant was not merely allowable in mitigation of damages. It could be considered upon the question whether the arrest was the act of the police officer alone, and if this explanation of the arrest was found by the jury to be true, it was a defence because the allegation that the wrongs were done by the defendant and its officers and servants were unproved.

The exception to the charge is to a part of it which occupies nearly four printed pages, and deals with different aspects of the case, while the exception is wholly general "to the foregoing instructions." The matters relied on in its support are chiefly those discussed in connection with the specific requests, and as no error was called to the attention of the presiding judge at the trial the exception must be overruled. *Brick v. Bosworth*, 162 Mass. 334, 336 and cases cited.

Exceptions overruled.

JOHN J. O'CONNELL vs. JOHN COX.

Middlesex. January 18, 1901. — June 6, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

Evidence, Extrinsic affecting writings, Part of res gesta. Boundary.

The words "about thirty-two feet to D.'s land," used in describing a boundary in a deed, are ambiguous and suggest the existence of some monument or abuttal, which extrinsic evidence is admissible to fix. The practical construction put upon the deed by the parties in treating a certain fence as the boundary is such evidence.

In an action of tort in the nature of trespass *quare clausum*, to determine a disputed boundary, the defendant testified that his deed was delivered to him elsewhere than on the premises, but that a few days before its delivery, he went upon the premises and through the house and yard in company with his grantor who then pointed out to him a fence as a boundary. This was admitted, not as evidence of boundary, but as evidence of seisin of the defendant's grantor. *Held*, that the evidence was competent to prove seisin, the pointing out of the fence as the boundary being part of the *res gesta*.

When a transaction is competent in evidence, declarations which are part of and characterize it are competent for the same purpose for which the transaction itself is competent.

TORT for breaking and entering the plaintiff's close. Writ dated May 23, 1898.

At the trial in the Superior Court, before *Stevens, J.*, without a jury, it appeared that the issue was as to the true boundary line between the adjoining lots of the plaintiff and the defendant on Jewett Street in Lowell. The tract in dispute contained about three hundred and thirty-seven square feet, and was a long wedge-shaped piece of land, nine feet across at the westerly end and coming to a point at the easterly end. The plaintiff alleged the true boundary to be the southerly line of the wedge running westerly and the defendant alleged it to be the northerly line running westerly after they diverged from a point in the westerly line of Jewett Street, which was conceded by both parties to be the true point of division between them on Jewett Street. On the line as claimed by the defendant there stood at the time of the trial the fence hereafter referred to.

The lots of the plaintiff and defendant were formerly parts of a lot of land owned by one Varnum under whom both the

plaintiff and defendant claimed. On May 7, 1878, Varnum conveyed the plaintiff's lot to one Mrs. Hargrave, who owned and occupied it until September 17, 1891, when she conveyed it to the plaintiff. The defendant took his deed from Varnum May 10, 1878, three days later than the plaintiff's grantor.

The description in the deed from Varnum to Hargrave was as follows: "A certain parcel of land with the buildings thereon situated on the westerly side of Jewett Street in said Lowell, being bounded as follows, to wit: beginning at the northeasterly corner of the premises on Jewett Street, thence running southerly along said Jewett Street thirty-six feet and six inches to land of my own; thence westerly along land of my own about seventy-five feet to land of McNabb; thence northerly along said McNabb's about thirty-two feet to Durant's land; thence easterly along Durant's land about eighty-three feet to the point of beginning."

The description in the deed from Hargrave to the plaintiff was in substance the same, including the words: "thence northerly along said McNabb land about thirty-two feet to land now or formerly of Durant"; describing the westerly line of the lot.

It appeared, from the plan used at the trial and other evidence, that if the westerly line of the plaintiff's lot was made thirty-two feet, it would begin nine feet on the defendant's side of the fence mentioned above and would establish the plaintiff's claim to the disputed wedge-shaped portion of the lot.

The plaintiff introduced evidence tending to show that shortly after his purchase in 1891, he notified the defendant that he claimed title to the tract of land in dispute, and in April, 1898, entered upon it and moved the fence then standing on the line as claimed by the defendant to the line as claimed by the plaintiff. In the following May the defendant forcibly entered upon the tract, took down the fence and replaced it on the old line, as it stood before it was moved by the plaintiff.

The defendant testified that at the time of the conveyance to him a fence stood on the old line running westerly from Jewett Street, the entire length of the lot, that he and Mrs. Hargrave had always treated this fence as the division line between the two lots, that both had repaired it at different times, and that

he and Mrs. Hargrave had filled in their respective lots up to the line of the fence and had raised the fence but had not changed the location. The plaintiff objected to the admission of this evidence for the purpose of showing the construction put by the defendant and plaintiff's grantor upon the deeds, and requested that, if admitted, it should be considered only on the question of adverse use. The judge refused to rule as requested, and admitted the evidence to show the construction placed upon the deeds by the defendant and the plaintiff's grantor. To this admission and the refusal the plaintiff excepted.

The defendant also testified that his deed from Varnum was delivered to him on May 10, 1878, elsewhere than on the premises, but that a few days before its delivery, in company with Varnum, he went upon the premises, and through the house and yard, and that Varnum then pointed out to him the fence as the boundary. He moved into the house the day after the delivery of the deed. The plaintiff objected to this evidence, and on its admission excepted.

Mrs. Hargrave, the plaintiff's grantor, was called as a witness by the defendant, and among other things testified that she moved into the house two or three days before her deed was delivered to her; that the fence then was on the old line, and had remained there up to the time she sold to the plaintiff; that her deed was delivered on the premises; that she had always treated the fence as the division line between her land and the land of the defendant; that she had repaired it at various times; that she had filled in her land up to the fence at the time the defendant filled in his, and that the defendant with her consent had raised the fence at that time, but had not changed the location. The plaintiff objected to the admission of this evidence for the purpose of showing the construction put by the witness and the defendant upon the deeds of Varnum to Hargrave and Varnum to the defendant, and requested that, if admitted, it should be considered only on the question of adverse use. The judge refused to rule as requested, and admitted the evidence to show the construction placed upon the deeds by the defendant and the plaintiff's grantor. To this admission and refusal to rule the plaintiff excepted. There was no other evi-

dence bearing upon the position of the fence, or material to the issue involved.

At the close of the evidence, the plaintiff asked for five rulings, two of which the judge gave, and refused to give the following: 1. That on all the evidence in this case the plaintiff's lot is bounded on the south by the new line claimed by the plaintiff. 3. That the language of the deeds of Varnum to Hargrave and Hargrave to the plaintiff is not of doubtful construction or ambiguous, and the acts of the parties at the time of conveyance and subsequently are not admissible to show intention. 5. The language in the deed from Varnum to Hargrave which defines the westerly line of the Hargrave, or plaintiff's lot, at "about thirty-two" feet established that line as thirty-two feet from Durant's land, unless from other portions of the deed it is clear that it was the intention to carry that line only as far as the old fence, and that no such intention can be gathered from the deed.

The rulings requested by the plaintiff which were given by the judge were as follows: 2. That no such use of the land in dispute is shown by the defendant as to warrant a finding that he had acquired title to the same by adverse possession. 4. That parol evidence of the acts and declarations of the defendant's grantor made to him at the time of transfer is inadmissible and cannot aid the court in fixing the disputed line.

The judge found for the defendant; and the plaintiff alleged exceptions.

J. J. Hogan & W. A. Hogan, for the plaintiff.

N. D. Pratt, for the defendant.

BARKER, J. The decision of two questions will dispose of this bill of exceptions. One is whether extrinsic evidence was admissible to aid the court in construing the deed of May 7, 1878. The plaintiff contends that the deed is unambiguous and that it establishes his southwest corner at the southwest corner of the disputed land thirty-two feet from Durant's land. But the language is "about thirty-two feet," and suggests that "there is some monument, abuttal or line there," which extrinsic evidence is admissible to fix. *Blaney v. Rice*, 20 Pick. 62, 64. To do this, evidence of the practical construction put upon the deed by the parties whose rights it governed was competent.

Reynolds v. Boston Rubber Co. 160 Mass. 240, 245, and cases cited. *Whittenton Manuf. Co. v. Staples*, 164 Mass. 319, 321. *Menage v. Rosenthal*, 175 Mass. 358, 361.

The other question is whether the testimony of the defendant was admissible that his deed was delivered to him elsewhere than on the premises, but that a few days before its delivery he went upon the premises and through the house and yard in company with his grantor who then pointed out to him the fence as the boundary.

The plaintiff is right in contending that this declaration, it not being shown at the trial that the grantor was not then living, was incompetent to prove that the fence was the boundary. *Flagg v. Mason*, 8 Gray, 556, 557. *Long v. Colton*, 116 Mass. 414, 415. *Adams v. Swansea*, 116 Mass. 591, 596. *Peck v. Clark*, 142 Mass. 436, 440. But there was a purpose for which the evidence was admissible. It was necessary for the defendant to prove seisin in his grantor. The pointing out of the fence as the boundary was part of a *res gesta* competent to show that seisin. When a transaction is competent declarations which are a part of and which characterize it are competent as part of the transaction for the same purpose for which it is competent. That the evidence was taken only upon the question of seisin is shown by the ruling "That parol evidence of the acts and declarations of the defendant's grantor made to him at the time of transfer is inadmissible and cannot aid the court in fixing the disputed line."

Exceptions overruled.

CONSTANCE S. KEITH vs. HENRY L. DE BUSSIGNEY
& another.

Suffolk. November 13, 1900. — June 17, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, BARKER,
HAMMOND, & LORING, JJ.

Conversion, What constitutes. *Bailment*, Right of bailee to terminate. *Damages*,
After breach of contract, not to be unreasonably increased. *Contract*, Implied.

If one, who takes a horse to keep and board for a certain period, having the use of him as compensation, fails properly to use and feed him, this is not exercising dominion over the horse adverse to the owner, so as to make the bailee liable for a conversion, even if his acts are such as to make him liable for negligence or breach of contract.

The owner of a horse, who has bailed him to another to use for a certain period in return for his board and keeping, cannot refuse to receive back the horse at the termination of the period on the ground that the bailee has injured the horse by want of proper food and care and by over use.

The bailee of a horse who has had the use of him for his board and keeping for a certain period, after the wrongful refusal of the owner to receive back the horse at the termination of the period, cannot recover from the owner the amount of the horse's board recovered from the bailee by a livery stable keeper with whom he placed the horse after notifying the owner that he was about to do so at his expense. The bailee can recover only the loss or expense necessarily incurred in ridding himself of the horse in a reasonable way, and he is bound to make such disposition of the horse as will terminate the owner's liability for damages or expenses as soon as he reasonably can.

One cannot be held liable on an implied contract to pay for that which he declined to permit to be done on his account, except that when one refuses to perform an obligation which the law imposes upon him, the law in some cases treats performance by another as performance for him and implies a contract on his part to pay for it. Per KNOWLTON, J.

CONTRACT to recover the amount paid by the plaintiff to one Andrews, a livery stable keeper, on a judgment obtained by him against her in *Andrews v. Keith*, reported in 168 Mass. 558, with a count on an account annexed to recover a reasonable amount for the board of a horse from July 23, 1895, to February 6, 1896. Writ dated January 20, 1898.

At the trial in the Superior Court, before *Bond, J.*, the following facts appeared: The defendants were husband and wife and were the owners of the horse, which they delivered to the plaintiff under the following agreement, signed by both defendants:

"Memorandum of Agreement made this day of September the 17th, 1894, between C. S. Keith and Mr. and Mrs. Henry de Bussigny. Miss C. S. Keith hereby agrees to take one horse belonging to said Mr. and Mrs. de Bussigny to keep and board from the said above date to the first day of June, 1895, provided said horse is suitable for ordinary family use. Said horse at all times to be properly fed and cared for, and it is further agreed that the said C. S. Keith is to be in no way responsible for the safety of said horse except in case of neglect or abuse, and to report any sickness or trouble that may occur to its owners, Mr. and Mrs. Henry de Bussigny, within a reasonable time. Compensation to Miss C. S. Keith to be the use of said horse during the above specified time and none other. Sharon, September 17, 1894."

At the end of the term the plaintiff sent the horse back to the defendants, who refused to receive it, declaring that the plaintiff had injured it by want of proper food and care and by over use; and after some correspondence with the defendants the plaintiff on July 23, 1895, put the horse in the livery stable of Andrews, and notified the defendants that they would be responsible for its board. The defendants refused to be responsible for any expense whatever in keeping the horse and suggested that the plaintiff should kill it. Andrews kept the horse until February 6, 1896, and then brought action against the plaintiff for its keep, and recovered in *Andrews v. Keith*, mentioned above.

The defendants introduced evidence of one Richards, who was employed by the plaintiff and had charge of the horse under the plaintiff's direction, who testified to the use he had made of the horse in ploughing greensward and driving it with heavy loads to Boston on successive days.

The defendants excepted to the admission of the record of the suit of *Andrews v. Keith*, to the exclusion of evidence offered by the defendants in regard to the condition of the horse when left with the plaintiff and when offered back to the defendants, to the refusal of the judge to order a verdict for the defendants, and his refusal to give the following rulings:

1. The plaintiff, when she took the horse under the agreement, must keep within the terms of the bailment as set out in the

agreement. If she violated its terms, and the horse was injured, she can have no action against the defendants for consequences that grew out of her violation of the agreement, and if the horse, by her putting it to service not contemplated in the agreement, depreciated in value, the defendants would be under no obligation to receive it at the end of the term of hiring, and no action could be maintained against them by the plaintiff for the care, custody or keeping of the horse, after the expiration of the time mentioned in the agreement. 2. One provision in the agreement on the part of the defendants is that the horse should be suitable for ordinary family use. The plaintiff's use of the horse was, therefore, limited to that purpose, and as there was no agreement that it was suitable for any other purpose, if it was used for any other purpose, and through that use depreciated in value, although such use might be no harder or more severe than the family use would be, the defendants would be under no obligations to take it back, and no action could be maintained against them for its board or care, after the expiration of the time mentioned in the agreement. 3. The plaintiff, after the defendants refused to receive the horse, even if there was no fault on her part, and she had performed all the obligations imposed upon her by law or by the contract, should do with it as persons with ordinary experience and prudence would have done with it, having reference to its value and all other circumstances. If the horse was of little value, the fact that the defendants refused to receive it would not justify the plaintiff in keeping or boarding it for a long time, or at a relatively great expense, either in her own stable or elsewhere. She should, after a reasonable time, have taken further steps to determine what disposition should be made of the horse, or have taken means to dispose of it as she could have done under the statutes of this Commonwealth.

The judge refused so to instruct the jury, and stated to counsel that the only question for the jury to determine was what was a reasonable sum for the keeping of the horse after the time when the plaintiff offered to return it and the defendants refused to receive it back, which sum was thereupon agreed on by the parties. Also, that the plaintiff could not recover the costs which she had been obliged to pay in the suit of *Andrews v. Keith*. The judge also ruled that no evidence had been intro-

duced which showed any change in the title to the horse, to which counsel for the defendants assented.

The jury returned a verdict for the plaintiff for the amount agreed; and the defendants alleged exceptions.

The case was submitted on briefs at the sitting of the court in November, 1900, and afterwards was submitted on briefs to all the justices.

T. E. Grover, for the defendants.

F. J. Stimson, L. M. Stockton & F. J. Macleod, for the plaintiff.

KNOWLTON, J. The evidence introduced and offered had no tendency to prove a conversion of the horse by the plaintiff. It went no further than to show that the horse had been used in ploughing greensward and in drawing heavy loads to Boston, and that it was not in good condition when the plaintiff endeavored to return it. Even if a jury might have found from the evidence that the plaintiff had not properly used and fed the horse, they could not have found that she had exercised dominion over it adverse to the defendants' rights, in such a way as to make her liable for a conversion of it. At most it would only have warranted a finding of negligence or breach of contract on the part of the plaintiff, for which she was liable in damages.

The horse remained the property of the defendants, and it was their duty to receive it when the plaintiff brought it back. On the issue of liability the evidence was rightly excluded, and the first two of the defendants' requests for instructions were rightly refused.

The third request was as follows: "The plaintiff, after the defendants refused to receive the horse, even if there was no fault on her part and she had performed all the obligations imposed on her by law or by the contract, should do with it as persons with ordinary experience and prudence would have done with it, having reference to its value and all other circumstances. If the horse was of little value, the fact that the defendants refused to receive it would not justify the plaintiff in keeping or boarding it for a long time, or at a relatively great expense, either in her own stable or elsewhere. She should, after a reasonable time, have taken further steps to determine what disposition should be made of the horse, or have taken means to dispose of it as she could have done under the statutes of this

Commonwealth." The judge refused to give this instruction, and ruled that the only question for the jury to determine was what was a reasonable sum for the keeping of the horse after the time when the plaintiff offered to return it and the defendants refused to take it back.

We are of opinion that this ruling was wrong. This was the situation of the parties. The plaintiff had received the defendants' horse under a bailment for hire, by the terms of which she was to have the use of it for its board and keeping. The time at which this bailment was to terminate had arrived, and the plaintiff had taken the horse back to the defendants and they had refused to receive it. There was no contract at any time by which she was to board the horse at the defendants' expense. They denied that they had any interest in the horse, contended that she had converted it to her own use, and virtually forbade her to do or expend anything on their account for the care or preservation of it.

There are at least two possible opinions as to the legal relations of the parties and the principles of law by which their rights are to be determined. One is that suggested by the cases of *Whiting v. Sullivan*, 7 Mass. 107, *Earle v. Coburn*, 130 Mass. 596, and *Putnam v. Glidden*, 159 Mass. 47. In this view the rules of law applicable to the case may be stated as follows: It is settled that under circumstances like these in this case the law will not imply a contract to reimburse one for the care of property against an owner who has expressly or impliedly declined to permit such care to be given on his account. No different principle is applied when the property is a live animal from that applicable to ordinary goods. In each of the three cases cited the owner of a horse which was in possession of another person refused to receive it, and the court held that he was not liable for its keeping to the person in whose possession it was left. The rule is that one cannot be held liable on an implied contract to pay for that which he declines to permit to be done on his account. The exception to the rule is that when the law imposes upon one an obligation to do something which he declines to do, and which must be done to meet some legal requirement, the law in some cases treats performance by another as performance for him, and implies a contract on his part to pay for it. A

familiar illustration of this is seen when the law holds one liable for necessities furnished to his wife, if he has without cause refused to provide for her; but there is no such obligation upon one to retain and preserve his property, whether it be live animals or anything else. He may destroy or abandon it, provided he does not thereby imperil the person or property of another.

In the present case the plaintiff had no right, against the will of the defendants, to expend money for the care and preservation of their horse on their account. The only liability of the defendants to her was a liability in damages for their refusal to receive their horse when she returned it. By the terms of the original bailment they impliedly agreed to receive it and relieve the plaintiff of it when she should bring it back, after the time for her keeping it had expired. Their refusal to receive it was a breach of their contract, and for such damage as resulted directly from their refusal the plaintiff can recover. But that damage includes only the loss or expense that has fallen or necessarily would fall upon the plaintiff in ridding herself of the horse in a reasonable way. It would not include compensation for the board of the horse for an indefinite time for the purpose of preserving it for the defendants. She was under no contract or obligation to keep the horse for their benefit, and if she so kept it, or if she kept it for her own benefit because she was doubtful how the dispute ultimately would be decided, such keeping was not a direct result of the defendants' breach of contract, and she cannot charge them with the expense of it.

The plaintiff in this case had not the full right of an involuntary depositary, who finds property whose owner is unknown. The finder of property may do that which is reasonably necessary for its preservation to prevent loss, and hold the owner responsible on the ground of implied agency. *Preston v. Neale*, 12 Gray, 222. See *Field v. Roosa*, 159 Mass. 128, 132. But if the owner is known and forbids incurring expense at his charge, no contract can be implied against him.

In the other view of the case the law may be stated thus: On the refusal of the defendants to receive the horse the relation of bailor and bailee still continued (*Andrews v. Keith*, 168 Mass. 558), but the obligation of the plaintiff to set the use of the horse against its keeping was at an end. It was a necessary

incident of the relation of the parties that she should be entitled to charge the defendants for the expense which formerly she had been bound to bear, because that expense had to be incurred by her so long as she remained the defendants' bailee.

But the defendants' liability under this view is no greater than as stated under the other; for she was bound to do that which was reasonable under the circumstances to keep the liability as small as possible. There is a line of decisions which establish the doctrine that where one party has broken an executory contract, the other who is in the right cannot go on indefinitely as if the contract still were unbroken, but is bound to do what he reasonably can to stop the damages for which the first party will be liable in consequence of his breach. *Collins v. Delaporte*, 115 Mass. 159, 162. *Clark v. Marsiglia*, 1 Denio, 317. *Danforth v. Walker*, 37 Vt. 239. *Allen v. Jarvis*, 20 Conn. 38. *Cort v. Ambergate Railway*, 17 Q. B. 127.

In either view the plaintiff was bound to make such disposition of the horse as would terminate the defendants' liability for damages or for expenses as soon as she reasonably could do it.

Exceptions sustained.

JEREMIAH T. GILES *vs.* ROYAL INSURANCE COMPANY
& others.

Suffolk. January 14, 1901. — June 17, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, BARKER,
HAMMOND, & LORING, JJ.

Award, Validity of submission, of award. Practice, Civil, Appeal.

The decision in *Miles v. Schmidt*, 168 Mass. 889, that an agreement to submit all disputes to a tribunal constituted by the parties themselves is void, has no application to an agreement of submission to arbitration under Pub. Sts. c. 188. On the contrary, submissions under the statute are favored by the court.

One having claims against various insurance companies arising from the destruction by fire of a building and its contents may make a valid agreement with all the companies for submission to arbitration under Pub. Sts. c. 188 providing for an award adjusting all the rights of the parties.

A submission to arbitration under Pub. Sts. c. 188 provided, that the award of the

arbitrators when filed in the Superior Court should be final, that no appeal therefrom should be taken and that the benefit of any appeal from or revision of the award was expressly waived by the parties. There also was a provision, that the person to whom the award was made might take out execution thereon or might at his election procure a decree in equity for the immediate payment of the sum so awarded. *Semble*, that, if there was any objection to the parties waiving a portion of their rights, their attempting to do so did not make the submission invalid. Moreover, that the provision in regard to waiving an appeal could not be construed to exclude an appeal to the court in case of dishonest dealing or to prevent the arbitrators from presenting a question of law to the court, and that the provision for a decree in equity was at most simply invalid.

A single award upon two submissions under Pub. Sts. c. 188 is bad.

In case of a submission to arbitration under Pub. Sts. c. 188, including claims of one plaintiff against several insurance companies who are parties to the submission, the award should state definitely the requirements imposed upon the various companies, so that a separate judgment for a sum of money may be entered against each defendant found answerable to the plaintiff.

An appeal from an order or judgment of the Superior Court on an award, under Pub. Sts. c. 188, § 12, must be founded on matter of law apparent upon the record, and one wishing to object to the ground on which a judge of the Superior Court granted or denied a motion to confirm an award must raise the question by exception, and not by appeal, unless the ground of the decision appears upon the record.

APPEAL under Pub. Sts. c. 188, § 12, from an order of the Superior Court denying a motion of the plaintiff to confirm an award of arbitrators and enter judgment thereon. Report of arbitrators transmitted to the court and opened by the clerk October 23, 1900.

The plaintiff was the owner of the Winslow House, a summer hotel at Wilmot Flat, New Hampshire, and of its furnishings and appurtenances. The hotel and its contents, which were insured in thirteen insurance companies, were totally destroyed by fire on November 29, 1899.

There were two agreements of submission to arbitration. The first was between the plaintiff and three of the insurance companies, and was signed by the parties thereto, and acknowledged on June 11, 1900. It was as follows:

"Know all men, that I, J. T. Giles, of Ellsworth, in the county of Hancock and State of Maine, hereinafter called the party of the first part, by William M. Prest, of Boston, in the county of Suffolk and Commonwealth of Massachusetts, his due and lawful attorney, hereto fully and specially authorized, and the Continental Insurance Company of the city, county and State of New York, and the Traders Insurance Company of

Chicago, in the State of Illinois, and the Victoria-Montreal Fire Insurance Company, of Montreal, Canada, hereinafter called the parties of the second part, by Frederick W. Brown, of said Boston, their due and lawful attorney, hereto especially authorized, hereby agree to submit all demands, claims, actions, or causes of action, between said party of the first part and said parties of the second part, or either or any of them, in any way, directly or indirectly, growing out of a certain fire occurring on or about November 29, 1899, to the hotel and its furnishings and appurtenances of said party of the first part, situated at Wilmot Flat, in the State of New Hampshire, to the determination of Charles F. Chamberlayne, Esq., of Bourne, in the county of Barnstable, Mr. Francis M. Edwards and John H. Colby, Esq., both of Boston aforesaid, and all in said Commonwealth, the award of whom, or the greater part of whom, in writing, being rendered on or before October 1, 1900, to the Superior Court for said county of Suffolk, shall be final, and if either of the parties neglects to appear before said arbitrators after three days' notice given to said Prest and Brown of the time and place appointed for hearing the parties, the arbitrators may proceed in his or their absence. No appeal, whether in point of law or fact, and whether apparent upon the face of said award or otherwise, shall be made to the award of said arbitrators when filed according to the foregoing submission, but the benefit of any appeal from or revision of said award is hereby expressly waived by both parties. And the award is made by mutual agreement and consent immediately, absolutely and finally binding upon all parties upon its being filed. Any sum found due by an award to said party of the first part from the said parties of the second part, or either of them, shall become due and payable absolutely and unconditionally within ten days from the day on which notice of the filing of said award shall have been given to said Prest or Brown; and said party of the first part, or his attorney, is at liberty to have judgment entered upon said award upon notice to the said party or parties of the second part, and take out execution thereon at any time after the expiration of such ten days, or he may at his election procure a decree in equity for the immediate payment of the sum so awarded on motion and notice at any time after the expiration of such ten days, and

may collect the said sums by the methods invoked in equity proceedings."

The second agreement of submission was between the plaintiff and eight other insurance companies, and was signed by the parties thereto, and acknowledged on July 10, 1900. Except in the names of the parties it was in the same language as the first agreement.

The award was dated September 10, 1900, and concluded as follows: "Much conflicting evidence was introduced before us as to the value of the insured buildings. As appears from the foregoing statement, there were, however, valued policies on said buildings amounting to \$8,500, and we accordingly find in favor of the plaintiff against the following companies for the amounts of said valued policies set opposite their respective names: The Manchester Fire Assurance Company \$2,500, The Commercial Union Assurance Co., Limited, \$2,500, Orient Insurance Company \$1,500, London and Lancashire Fire Insurance Co. \$2,000.

"In view, however, of the additional real estate insurance existing on said buildings at the time of the loss, which in our judgment ought equitably to contribute to the same, we award and order that the plaintiff assign to said companies, to wit, the Manchester Fire Assurance Company, the Commercial Union Assurance Co., Limited, the Orient Insurance Company, and the London and Lancashire Fire Insurance Company, in proportion to their said payments, all claims he may have under said other real estate policies against the Quebec Fire Assurance Company, the Eastern Counties Insurance Company, the Indiana Insurance Company, the Minneapolis Fire and Marine Mutual Insurance Company, the Michigan Manufacturers Mutual Fire Insurance Company, together with the right to bring suit on said claims in the name of the plaintiff, but without expense to him; together with the benefit and subject to the burden of any agreements for settlement heretofore made, or expenses and fees heretofore incurred, and to return as aforesaid the net proceeds of any settlement collected and actually received by him from the Alexandria Insurance Company, and the Merchants Insurance Company of New Orleans, — the liability of said outside real estate insurance to be upon a finding of a value of \$8,500 on the buildings, which we find to be a fair value of

the same under said insurance contracts. And we direct, award and order said Indiana Insurance Company, Minneapolis Fire and Marine Mutual Insurance Company, and Michigan Manufacturers Mutual Fire Insurance Company, to pay the respective amounts of their liability to the plaintiff to said companies as aforesaid.

"Much conflicting evidence was also introduced before us as to the value of the furniture and fixtures of said hotel. Upon full consideration of the same we find that a fair value of said furniture was \$2,000, and we hereby award that the plaintiff recover from the following companies the sums set opposite their respective names: Traders Insurance Company \$400, Continental Insurance Company \$1,000, Victoria-Montreal Insurance Company \$600.

"The foregoing finding and award is made by a majority of the referees, Mr. Francis M. Edwards being present, but not assenting thereto nor concurring therein. Charles F. Chamberlayne, John H. Colby, Majority of Arbitrators."

A motion by the plaintiff, that judgment be entered upon the award and that the award be accepted and confirmed, was denied by the Superior Court on November 1, 1900. From the order denying this motion the plaintiff appealed.

The case was submitted on briefs at the sitting of the court in January, 1901, and afterwards was submitted on briefs to all the justices.

W. M. Prest, for the plaintiff.

A. E. Pillsbury & F. W. Brown, for the defendants.

HOLMES, C. J. The plaintiff having had a loss by fire and having claims against various insurance companies, signed an agreement intended to be a reference to arbitration under Pub. Sts. c. 188, with three of the companies that had insured furniture and fixtures. A little later he signed another similar agreement with eight other companies that had insured buildings. The arbitrators made an award, single in form, upon the two submissions, the plaintiff moved for judgment, his motion was denied, and the case is here by appeal.

Notwithstanding the language in *Monosiet v. Post*, 4 Mass. 532, we are disposed to deal as little technically as possible with what seems a very good contrivance for reaching a judg-

ment by a summary process when the parties are willing to agree to it. See *Strong v. Strong*, 9 Cush. 560, 564. The case of *Miles v. Schmidt*, 168 Mass. 339, has no application, as it did not concern a submission under the statute.

The joinder of defendants against whom the causes of action were several and distinct in a single instrument does not seem to us fatal. Each submission may be regarded as in substance equivalent to as many submissions as there are defendants, although there are reasons to be mentioned which made it desirable to bring the policies on a single subject matter into a single proceeding. If it should be urged that there must be several judgments and that, as the submission is to be the foundation of record upon which each judgment is to rest, when the cause of action is distinct the submission should be distinct also to the same extent as the writ and pleadings of which it takes the place, *Whitney v. Cook*, 5 Mass. 139, 143, the answer is that the submission may be entered as many times as there are separate defendants. But, further, the misjoinder of defendants severally liable in contract and severally capable of submitting their case to the jurisdiction of the court in this form does not affect the jurisdiction of the arbitrators or of the court, and it would not be going very far to say that by consenting to a single submission the several defendants have estopped themselves to object to the joinder, which is their own act, and that no one else can complain.

However, we do not mean to stop here. It is evident that the joinder of parties was with an intelligent design which we see no reason for not carrying out. It is true that the claims against different insurance companies are distinct. But if all the policies are on the same risk it is at least convenient, and may be important, that all the companies should be represented in any adjustment that takes place. Their burdens may have to be equalized in one way or another. *Wiggin v. Suffolk Ins. Co.* 18 Pick. 145, 153. May, Ins. (4th ed.) § 13. Massachusetts Standard Form, St. 1894, c. 522, § 60. The statute allows all controversies which might be the subject of a suit in equity to be submitted to arbitration as well as those which would end in a personal action at law. Pub. Sts. c. 188, § 1. All demands of a personal nature between the parties may be submitted at once,

and the "submission may be varied in this respect in any other manner, according to the agreement of the parties." § 8. It seems to us that taking these provisions together we fairly may regard it as within the scope of the statute, in such a case as we have supposed, to submit all the rights of the parties to a single award which shall determine not merely the primary legal right of the plaintiff under his several contracts but also the subsidiary equities of all the parties, at least so far as they affect the amount ultimately to be paid by each to the plaintiff, without the many proceedings which but for this short cut might be necessary before the whole matter was at rest. We also are of opinion that the submissions by implication have this end in view. As the Superior Court now has general equity jurisdiction, some of the reasoning in *Brown v. Evans*, 6 Allen, 333, no longer applies.

If we are right so far, the main difficulties are out of the way. In the opinion of a majority of the court the agreements in the submissions which go beyond the statute do not invalidate them. If there is any objection to the parties' waiving a portion of their rights, at least there is no question of illegality. So far from attempting to exclude the jurisdiction of the courts, the root of the whole matter is that the parties submit themselves to the judgment of the court. But further, the words add little to what would have been the law without them. *Ellicott v. Coffin*, 106 Mass. 365, 367. *Cowley v. Dobbins*, 123 Mass. 587. See *Carter v. Carter*, 109 Mass. 306, 309; *Gardner v. Boston*, 120 Mass. 266; *Rogers v. Mayer*, 151 Mass. 279. They cannot be construed to exclude an appeal to the court in case of dishonest dealing. They do not prevent, or purport to prevent, the arbitrators presenting a question of law, the answer to which by the court is a condition of their award. *Ellicott v. Coffin*, 106 Mass. 365, 368. If they mean anything, they are intended to contract against the objections to the submission which the defendants do not seem to have felt estopped to urge. The only noticeable departure from the legal effect of the submission is the provision for a decree in equity, and that at most is simply invalid.

The award may be sustained so far as it lays the foundation for a decree adjusting all the rights of the parties to the second submission. So it may be sustained so far as it entitles the

plaintiff to several judgments against the three companies that were parties to the first. But as it is a single award upon two submissions it cannot be upheld in its present form. *Tudor v. Peck*, 4 Mass. 242, 243. Probably it should be recommitted, *Blood v. Robinson*, 1 Cush. 389, *Preston v. Knight*, 120 Mass. 5, 8, and the arbitrators instructed to make two awards and also to make certain and definite those requirements which in the report as it stands are left vague, so that separate judgments for a sum of money may be entered against each defendant found answerable to the plaintiff. *Day v. Lafin*, 6 Met. 280, 285. *Lincoln v. Whittenton Mills*, 12 Met. 31. *Fletcher v. Webster*, 5 Allen, 566. See *Brown v. Evans*, 6 Allen, 383.

We have taken the case on the footing on which it is presented by the parties. But in order properly to raise the questions argued, the plaintiff should have taken exceptions. On appeal the record does not show the ground on which the plaintiff's motion was denied. *Bent v. Erie Telegraph & Telephone Co.* 144 Mass. 165, 166. *James v. Southern Lumber Co.* 153 Mass. 361, 365.

Order of Superior Court affirmed.



MARY J. BURNHAM vs. COLLATERAL LOAN COMPANY.

Suffolk. March 6, 1901. — June 17, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, BARKER,
HAMMOND, & LORING, JJ.

Malicious Prosecution. False Imprisonment.

One who, believing that a crime has been committed, sends for a police inspector and fairly and truthfully discloses to him all matters within the speaker's knowledge which he supposes to have a material bearing upon the question of the innocence or guilt of the person suspected, and leaves it to the officer to act upon his own judgment and responsibility as to whether or not there shall be a criminal prosecution, and does no more, cannot be held answerable in an action for malicious prosecution, in case the officer comes to the wrong conclusion and prosecutes when he ought not to do so. It makes no difference that the person who sends for the officer and gives him the information is in the habit of doing this in similar cases.

In an action against a pawnbroker for alleged malicious prosecution and causing the unlawful arrest of the plaintiff, it appeared, that the plaintiff represented herself to the defendant as the owner of certain articles which she pledged to him, whereas she held them under a contract of conditional sale, the title being in the vendor, and that the defendant learning of the facts called in a police inspector and informed him of them. The plaintiff offered to show that the defendant held other property of hers more than sufficient to cover all loans which the defendant had made to her and which he had a right to apply to the payment of the loans, and that the defendant did not investigate and report to the officer the state of the general account between him and the plaintiff. *Held*, that the evidence properly was excluded as immaterial, having no bearing whatever upon the pledging of the property of another which was the only thing that the defendant was reporting to the officer. *Held, also*, that evidence to show an offer of the plaintiff to pay the defendant after her discharge from arrest was likewise immaterial, as also was evidence that the plaintiff gave the pawn ticket to the owner of the pledged articles and had no intention of committing a fraud, neither of these facts being known to the defendant at the time he called in the officer.

TORT against a loan company for malicious prosecution of the plaintiff and causing her arrest and imprisonment on a charge of selling and conveying, with intent to defraud, personal property in her possession under a written conditional contract of sale. Writ dated May 11, 1898.

At the trial in the Superior Court, before *Maynard, J.*, it appeared, that the plaintiff was arrested by one Glidden, a police officer, on March 21, 1898, and brought before the Municipal Court of the city of Boston for trial, on a complaint by him under Pub. Sts. c. 203, § 74, for selling and conveying to the defendant, with intent to defraud, two diamond earrings, which, it was alleged, had been bought of one Ginsberg on a written conditional contract of sale; that on March 29, 1898, the case was tried in the Municipal Court, and the judge found the plaintiff not guilty and ordered her discharge.

There was evidence tending to show that the plaintiff on November 3, 1897, bought of one Ginsberg, under a written conditional contract of sale, a pair of diamond earrings for the sum of \$185; that on that day she paid the sum of \$25 down, and agreed to pay a certain sum each week until the whole was paid, and took possession of the earrings; that on the next day, November 4, 1897, she pledged the earrings to the defendant for the sum of \$80, and received from the defendant its ticket numbered 21,805; that on or about March 18, 1898, Ginsberg exhibited to the defendant the conditional contract of sale above mentioned, and

the ticket of the defendant issued to the plaintiff, and stated that the articles so pledged were his, and demanded them as his property; that the conditional contract of sale had upon it indorsements showing payments by the plaintiff on account to the amount of \$22 in addition to the \$25 paid on November 3, making the payments in all \$47, and that no payments had been made since January 29; that thereupon the defendant, through its president or its cashier, sent to the board of police in the city of Boston for a police inspector; that it was their custom to do so in cases of this kind, and that the officer after receiving from the defendant a statement of the facts proceeded in his own way to get the information needed, and from that time until after the plaintiff was discharged in the lower court the president or cashier did not see the officer again in regard to this matter.

One Cobb testified, that he was president of the defendant at the time of testifying and had been president for a term of ten years, and was president at the time of the transactions between the defendant and the plaintiff; that he sent to the police headquarters at Pemberton Square for a police inspector; that an officer came to his office; that he submitted to him the facts, which he usually did in a case of that kind; that he showed him what he believed to be a fraud; that the officer knew his duty and did it; that he did not give the officer the plaintiff's address, but supposed that he procured it; that he did not inquire where the plaintiff lived, and did not know how the officer obtained her address; that he had a clerk in the office named Reed; that he sent for the police officer to show a transaction that seemed to be wrong and a fraud. "Q. Can you give me the substance of what you said? A. I cannot; it is a thing that occurs four or five times a month in our office, — this matter. I don't know. It is a thing that is so clearly understood by the officer when he comes and sees these facts. — Q. That he comes to make an arrest? A. He does not make the arrest until he makes the inquiry. He gets the facts from us, and then goes and pursues the investigation. I don't decide. I don't instruct the officer what to do." The defendant further testified, that his cashier, one Moore, gave the officer the statement of facts; that he was present at the time; that he did not see the officer again until the officer reported to him the result of that case.

The plaintiff offered to prove by Cobb that at the time she was arrested the defendant had in its possession other property of hers more than sufficient to cover all loans which it had made her, and which it had a right to take under the various contracts with her. The defendant objected to the admissibility of the evidence, the judge sustained the objection, and the plaintiff excepted.

On cross-examination Cobb testified, that before talking with the police officer, or at the time he talked with the officer, or after talking with the officer, he did not make an investigation to find out what the status of the account between the defendant and the plaintiff was. "Q. Did you at any time before sending for the police officers, investigate yourself, or by any agent of yours, to determine the state of the account between your concern and the plaintiff?" This question was objected to by the counsel for the defendant, and was excluded by the judge as immaterial, and the plaintiff excepted. The plaintiff offered this evidence for the purpose of showing that the defendant did not properly and fairly investigate the charge.

The plaintiff offered to show by Cobb that on April 29, 1898, she offered to pay the defendant all the money that was due it from her, and that the defendant refused to receive the amount which it had loaned her on account of the diamond earrings. The judge excluded the evidence, and the plaintiff excepted.

On re-direct examination Cobb testified, that when Ginsberg showed him the contract, it did not occur to him to send for the plaintiff; that he did not inquire of Ginsberg at that time what arrangement the plaintiff had made with Ginsberg in reference to the earrings; that he did not recollect any conversation he had had in reference to how Ginsberg happened to have the pawn ticket in his possession when he talked with the witness; that he did not think it strange that he had the pawn ticket; that it was a common thing for a party to surrender the pawn ticket to avoid trouble.

The plaintiff testified, and was asked by her counsel in direct examination: "Q. When you obtained this money from the Collateral Loan Company, did you intend to defraud them?" The defendant objected and the judge excluded the question; to which the plaintiff excepted.

The plaintiff testified, that she gave Ginsberg the pawn ticket in question. This evidence, however, the judge ordered to be stricken out, and the plaintiff excepted.

The plaintiff further testified, that in March, 1898, two police officers came to the house where she lived quite early in the morning, one of them being Glidden. She was then asked the question: "Will you tell the jury just what they did there?" This was objected to by the counsel for the defendant, and the judge ruled that it was not admissible at that time, saying "I shall exclude this evidence at the present time, and, if you show further evidence that satisfies me you have a right to go to the jury on that question (the instigation of the prosecution of the plaintiff by this defendant), I will allow you to interrogate her further." This evidence was not again offered because the judge, after hearing other evidence, ruled that the plaintiff had not shown that the defendant had authorized the arrest.

Glidden testified, that he was a police inspector in the city of Boston; that he went to the defendant's office in March, 1898; that he got word from some source that they wanted to see him; that he did not remember whether it was a message, or a note, or how; that when he got there he saw Moore and Cobb, and the usual army of clerks; that he did not know what was wanted of him before he got there; that one of them gave him a memorandum on a piece of paper of the name of the plaintiff, and of a loan of \$80 on some earrings, and the dates; that they told him that they had been claimed by a man by the name of Ginsberg, who had exhibited a lease, and asked him to investigate the matter; that he had a conversation with Ginsberg, and after he saw him he did not think he went back to the defendant's office. "I have prosecuted several of these cases, quite a number of them; and it was a kind of an understanding that if they sent for me, and produced a memorandum with the name, date, amount loaned and article, telling me that it was claimed that they were leased goods, that I should investigate and so go ahead and prosecute them, if I thought there was a case"; that he had this understanding with them for a good while, so that each time they would not have to repeat it; that he had prosecuted quite a number of such cases before for the defendant; that they did not give him the pawn tickets or contract; that he got the con-

tract from Ginsberg. "Q. You understood they had left it with you? A. Yes, sir. — Q. To go ahead if you thought there was a case? A. That is right."

Moore testified, that he remembered the matter of these two diamonds; that he was present at the time officer Glidden came; that he and Cobb talked together about sending for him; that they talked over the fact that under the circumstances they ought to lay it before the officer; that he and Cobb both talked with the officer; that they gave Glidden the facts of the case as they understood it at the time about the diamonds being pledged there by the plaintiff on the fourth of November, 1897, and that Ginsberg had stated that he leased them to her on the third of November, and asked him to investigate the case and attend to it; and that Glidden said he would attend to it. "Q. Was he to make any further report to you before doing anything? A. No, sir." That neither Cobb nor himself told Glidden when he came that they had had other transactions with the plaintiff.

At the close of the evidence, the judge ordered the jury to return a verdict for the defendant; and the plaintiff alleged exceptions.

The case was argued at the bar for the defendant in March, 1901, the plaintiff submitting a brief, and afterwards was submitted on briefs to all the justices.

W. H. Baker, for the plaintiff.

W. C. Wait, for the defendant.

HAMMOND, J. The defendant's officers, believing that a crime had been committed, sent to the police headquarters for a police inspector. In compliance with the request, Glidden, an inspector, came to the office of the defendant, whose officers stated to him the facts so far as material. There is no evidence which would warrant a finding that they said to him anything which was false, or concealed from him any material fact which was true, or that they directed the officer to begin a prosecution. Everything was left to him. They expected, and so did he, that he would make further investigation; that if in the end he determined that the case should be prosecuted, he would act accordingly; and that in all this he would act not as the agent and in behalf of the company, but as a public officer, charged with the duty of detecting crime and of prosecuting according to law.

those accused of it. It is true that the officer testified, that he had prosecuted quite a number of cases before for the defendant, but the language, taken in connection with the context, cannot be fairly interpreted to mean that he in those cases acted as the agent of the company or in any way under its direction or influence.

The officer in the end was to act upon his own judgment in this case. He did act upon it; therefore the complaint was not made by him as the agent of the company, and the defendant cannot be held upon the ground that it made the complaint. Nor is the connection of the defendant with the case in any way such as to show that it can be held responsible for the decision of the officer. It is true that they gave him information upon which he relied and by which he may be presumed to have been influenced in his conclusion to prosecute, but that is not of itself sufficient. The principles governing the rights and liabilities of the parties to an action for malicious prosecution are the result of a compromise between the right of the individual to be free from arrest or prosecution upon a charge of which he is innocent and the right of the community to be protected from crime. And one of these principles is that if a person discloses fairly and truthfully to the officer, whose duty it is to detect crime, all matters within his knowledge which, as a man of ordinary intelligence, he is bound to suppose would have a material bearing upon the question of the innocence or guilt of the person suspected, and leaves it to the officer to act entirely upon his own judgment and responsibility as a public officer, as to whether or not there shall be a criminal prosecution, and does no more, he cannot be held answerable in an action for malicious prosecution, even if the officer comes to the wrong conclusion and prosecutes when he ought not to do so. Such a person does no more than his duty; and to hold him answerable in an action for malicious prosecution for the result of the mistake or misconduct of the officer would be to make the division line of compromise between the right of the individual to his liberty and the right of the public to protection trench too far upon the domain of the latter. *Monaghan v. Cox*, 155 Mass. 487. *Smith v. Austin*, 49 Mich. 286. *Lark v. Bande*, 4 Mo. App. 186. See also *Dixon v. New England Railroad*, ante, 242. Nor does it make any difference that a person does this in many cases.

Tested by this principle, the plaintiff failed to make out a case, and a verdict was rightly ordered for the defendant.

We see no error in the exclusion of evidence. The offence for which the plaintiff was tried, and of which she was acquitted, was that she, being in possession of personal property, to wit, two earrings received upon a certain written and conditional contract of sale, with intent to defraud, sold and conveyed the same to the defendant. There was no question that she did pawn the earrings thus held by her to the defendant, and received from it the sum of \$80; and that in that transaction she in substance represented herself and was understood by the defendant to be, the owner of the earrings, and that the loan was made upon them and upon nothing else, and all parties knew this. Such a transaction was a fraud both upon the defendant and Ginsberg the real owner of the earrings, and upon the question of the plaintiff's guilt we think the facts that the defendant held property of hers more than sufficient to cover all loans which they had made to her and which they had a right to take under the various contracts with her, and that the defendant did not investigate and report to the officer the state of the general account between it and her, were immaterial. They had no bearing whatever upon the nature of the transaction about the earrings, which was the only thing the defendant's officers were submitting to the police inspector. The offer of the plaintiff to pay the defendant was made after her discharge, and therefore was of no consequence. And we do not see how the defendant could be held answerable for not informing the officer that the plaintiff gave to Ginsberg the pawn ticket and that she had no intention of committing a fraud, because neither of such facts was known to the defendant at the time it called in the officer. The circumstances occurring at the time of the arrest affected only the question of damages, and, there being no liability, evidence as to them becomes of course immaterial.

The result is that there appears no error in the rulings as to evidence, and that there is no ground upon which the defendant can be held answerable to the plaintiff for the prosecution of which she complains.

Exceptions overruled.

GERALD WYMAN vs. THOMAS A. WHICHER & another.

Suffolk. March 20, 1901. — June 17, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, BARKER,
HAMMOND, & LORING, JJ.*Evidence, Presumptions and Burden of Proof. Auditor's Report. Practice, Civil, Rulings and Instructions.*

An auditor's report without changing the burden of proof makes it incumbent upon the other party to go forward with evidence to rebut and control it, but, after evidence has been put in on both sides upon the matters dealt with by the auditor, it would be error to instruct a jury, that there was a presumption of fact that the auditor's report was right. In such a case it is for the jury to consider the evidence anew and to settle for themselves how far they should be influenced by the report.

A request for a ruling not incorrect in law but put in such a form as to amount to an argument, and otherwise unnecessary, properly may be refused for that reason.

CONTRACT to recover compensation for professional services as an expert accountant, for six hundred and thirty-four hours at \$5 an hour, \$3,170 and for expenses \$61.84. Writ dated June 16, 1894.

At the trial in the Superior Court, before *Bond, J.*, the plaintiff put in the report of Charles E. Grinnell, Esquire, auditor in the case, in which he found due to the plaintiff the sum of \$1,731.84 with interest from the date of the writ. In addition to the auditor's report oral testimony was introduced on both sides. The defendants presented requests for instructions which were refused by the judge.

The jury returned a verdict for the plaintiff in the sum of \$1,825.17; and the defendants alleged exceptions, which are stated in the opinion of the court.

The case was argued at the bar in March, 1901, and afterwards was submitted on briefs to all the justices.

E. F. McClennen, for the defendants.

C. B. Southard, (*T. Parker* with him,) for the plaintiff.

HOLMES, C. J. This is an action for services as an expert accountant. At the trial the plaintiff put in an auditor's report in his favor. The defendant *Whicher* then testified that there

was no agreement as to the rate of charge and that the work done was useless. The plaintiff in reply testified that he told Whicher that he charged five dollars an hour and expenses, the fair implication of his testimony being that that was, and was understood to be, his regular price. The plaintiff also explained the services rendered and their value. He had a verdict, and the case is here on exceptions.

The most important exception is to the mode in which the judge dealt with the auditor's report. There is no doubt that some passages of the charge would give a wrong notion of the law. After stating that in the absence of other evidence the auditor's report would determine the rights of the parties, the judge went on that therefore the plaintiff put in the auditor's report and rested, "and the defendants undertook the burden of showing you that the auditor's report is wrong." And later, again: "The defendants have to satisfy you that the auditor's report is wrong. Starting with the position that the auditor's report is the guide in coming to a conclusion upon that matter, is your opinion changed by the fact that testimony has been introduced by the defendants and the plaintiff?" Taken by themselves the first passage suggests that the auditor's report shifts the burden of proof, and the second that the auditor's finding for one party raises a presumption of fact in favor of that side even when the only evidence is that of the plaintiff and the defendant, and when their testimony has been heard afresh by the jury.

It is settled, of course, that an auditor's report merely puts on the other party the burden of going forward with evidence to rebut and control it, but does not change the burden of proof. *Morgan v. Morse*, 13 Gray, 150. *Holmes v. Hunt*, 122 Mass. 505, 514. *Phillips v. Cornell*, 133 Mass. 546, 548. We assume further that after evidence has been put in on both sides a jury could not be instructed without error that there was a presumption of fact that the auditor's report was right. It would be for the jury to say what weight they would give to the report. Especially in a case like this, where the auditor's report was merely his judgment on evidence which the jury had heard, they could not be told to attribute any degree of weight to his finding rather than to consider the evidence anew, settling for them-

selves how far they should be influenced by the report. But we think that the judge was perfectly aware of the law, and that although he used expressions which, taken by themselves, might mislead, he laid down the correct rule in such terms that it may be supposed to have been understood.

The judge stated to the jury that the rule is that "the auditor's report does not change the burden of proof, technically speaking, which is on a party to establish by evidence essential to the maintenance of his case; but while the burden of proof is not shifted by the auditor's report, yet, as it makes out a *prima facie* case, it is incumbent on the other party to meet and control it, or it will be conclusive against him." This was sufficiently clear with regard to the burden of proof, and we are of opinion that the jury were instructed rightly upon that point. With more hesitation we have come to the conclusion that the charge may be sustained upon the other point also, as signifying not that there was a presumption of fact in favor of the auditor's report when the whole case had been set at large by evidence, but only that it was for the jury to consider whether the whole matter had been set at large, so that the plaintiff no longer could rest upon his *prima facie* case. No doubt there was some emphasizing and holding up of the auditor's report to the jury in a conspicuous light, perhaps because the judge thought that it came to a right conclusion, but we are not prepared to say that the charge laid down or implied a wrong rule of law so distinctly that an exception should be sustained. The phraseology employed doubtless was suggested by the terms of the language in *Morgan v. Morse*, 13 Gray, 150, 152, 153, and in *Phillips v. Cornell*, 133 Mass. 546, 548, and, although it was dangerous and objectionable, finds considerable excuse in the earlier cases.

The defendants excepted to the refusal to give the following ruling: "Unless you find that the plaintiff and defendants arranged for a particular price for the plaintiff's services, the plaintiff became entitled to only such sum as his services were reasonably worth, and in determining this you may consider the results accomplished and the work required to accomplish it, not merely the time which he expended." This sounds plausible, but really was an argument, no doubt urged sufficiently to the jury, for a particular mode of estimating the sum to be recov-

ered. The jury were told that the time employed was not conclusive, and the judge, by admitting testimony that the service rendered turned out valueless, allowed the jury to consider the results accomplished. But he seems to have thought, and no doubt rightly, that it was not necessary to single out that element for the jury's attention, and that, seeing that the plaintiff was not employed for a definite or specified task but rather to work upon books under the defendant's eye, it was more important, if there was no agreement, to consider the going rate for that kind of work when furnished by accountants of the plaintiff's standing.

The defendants further excepted to the refusal to give the following ruling: "In estimating the value of the plaintiff's services the jury are not bound by his testimony, even though it is not contradicted or controlled by the evidence. Upon such questions the jury are to be guided by their own skill and knowledge as well as by the testimony which is given by witnesses at the trial." This request again was rather an attempt to get in a last word of argument than a request for a needed instruction. The tenor of the charge from beginning to end left it free to the jury to use their own judgment in deciding what was a proper charge. In a case where the plaintiff and principal defendant contradicted each other, and where the argument must have dealt with the contradiction, it cannot be supposed that the jury needed to be told that the testimony of an interested party did not necessarily bind them to follow it.

The last exception argued is to an instruction that the plaintiff, if entitled to recover, was entitled to recover interest from the time he made a demand. It is objected that there was no evidence of any demand until just before suit except a request for payment not informing the defendants of the amount of the bill; and that the instruction allowed a recovery after this demand contrary to *Goff v. Rehoboth*, 2 Cush. 475. Compare *Ford v. Tirrell*, 9 Gray, 401; *Mercer v. Vose*, 67 N. Y. 56. But the judge pointedly told the jury that if there was no formal demand before the suit, or if they were unable to determine the time of it, they were to compute interest only from the date of the writ. He referred to letters in evidence but not before us to show at what time, if ever, the demand was made. If we are

to assume that the letters did not show a demand we also must assume that the jury perceived the fact on looking at them. We do not see how we can take the ruling as implying anything one way or the other as to what kind of demand would be sufficient or as referring to the above-mentioned general request for payment. If the judge was mistaken in assuming that there might be a demand or evidence of a demand in the letters, no exception was taken to that error, if an exception would lie for referring the investigation of the letters to the jury instead of making it himself.

Exceptions overruled.

JAMES B. THAYER & another, trustees, *vs.* HELEN RIVERS,
executrix, & others.

Suffolk. April 2, 1901. — June 17, 1901.

Present: HOLMES, C. J., KNOWLTON, LATHROP, BARKER, & HAMMOND, JJ.

Devise, Execution of power of appointment.

It is a familiar rule of law, that a donee of a power of appointment, who is given authority to choose and appoint an object of the power according to his judgment and discretion, cannot delegate the exercise of that discretion to another. But one having an estate with a power of appointment, under which he may give an absolute interest, or may put limitations on the use and enjoyment of that which otherwise would be such an interest, properly may exercise the power by giving one substantially the whole interest in the property and the whole control of it, in the form of a right of personal use and enjoyment during his life, with a right to appoint who shall have it after his death.

A will giving to the testator's children life estates with power of testamentary appointment contained this provision: "It is my will that my daughters and son shall have power of disposing of their respective shares of my estate among my lineal heirs, to have and enjoy the same upon such terms and provisions as may be prescribed by my children." A daughter of the testator, in attempted execution of this power, gave life estates to such of two nieces and a nephew as should survive her, and after their respective deaths the trustee was directed to convey the proportion or share of the trust fund which had been enjoyed for life by the decedent to such person or persons except the husband of one of the nieces as the decedent might by will appoint; and, in default of such appointment, to convey the share to the issue of the decedent. The nephew survived his aunt and died leaving a widow and two children, and by his will appointed his share of the property to his wife for life and after her death to his children in equal shares. *Held*, that the appointment by the daughter of life estates to her two nieces and her nephew was good, but that the attempted gift to her nieces

and nephew of the power to appoint anybody except the husband of one niece was void, because, whether or not it was void for other reasons, it purported to authorize an appointment to others than the lineal heirs of the original testator and thus exceeded the terms of the power under which she attempted to act. Therefore the attempted appointment in the will of the nephew under the invalid authority was as if it had never been made, and his share of the property went to his children under the appointment in his aunt's will providing that in default of appointment by him it should go to his issue.

BILL FOR INSTRUCTIONS brought by the trustees under the will of Rosalie G. Russell, as to their duties under the ninth clause of that will which purported to be in execution of a power of appointment given to Rosalie G. Russell by the will of her mother, Lydia Smith Russell, filed October 10, 1900.

The facts as set forth in the bill and admitted by the answers were as follows:

Lydia Smith Russell, widow, late of Milton, died December 19, 1859, leaving a will and four codicils which were proved in the Probate Court for the county of Norfolk March 31, 1860.

The testatrix left surviving her three children, two daughters, Geraldine I. Rivers, afterward Geraldine I. Upton, and Rosalie G. Russell, and a son, Jonathan Russell, who was more than twenty-one years of age at the time of his mother's death. These were the only children living at the death of the testatrix and there was no issue of any deceased child. In consequence thereof, by the terms of the will, two thirds of the residue of the estate of the testatrix was held in trust to pay the net income thereof to the two surviving daughters during their respective lives.

Lydia Smith Russell in her will made provisions concerning these shares, the income of which was payable to her daughters, as follows:

"Fourth. In case either of my daughters or my son shall die leaving issue, then it is my will that such issue shall have and be entitled to such share or shares of my real and personal property, and of the rents and income thereof, as his, her, or their deceased parent or parents would have had and been entitled to under my will if living.

"Fifth. In case either of my daughters shall die having survived me and without issue, then her share of my real and personal property, and of the rents and income thereof, shall be

held subject to such conditions, restrictions, and limitations as such daughter at any time during her life by any deed or deeds, sealed and delivered, in the presence of two witnesses, or by her last will and testament in writing, or any writing in the nature of and purporting to be her last will and testament, to be signed and published in the presence of and attested by three or more credible witnesses (whether she shall be married or not and notwithstanding any coverture), may direct or appoint; and in default of such direction or appointment, then such share as aforesaid shall be equally divided among my surviving children — and the issue of any deceased child shall take its parent's share by right of representation, and the property thus to be divided shall be held upon the same terms and provisions as are herein made as to the original portions. . . .

"Seventh. It is my will that the trusts herein created shall continue during the lives of my daughters and the survivors and survivor of them, and at the death of my last surviving daughter, all the property then held in trust shall be divided among those who shall be thereto entitled, as an absolute estate of inheritance, and they shall become seised and possessed thereof to their own use and behoof forever. And the persons to be entitled thereto are the children of my daughters, to take by right of representation, and if either of my daughters dies without issue and without making any direction or appointment as to her share as aforesaid — then the same shall be divided between the children of my other daughters or daughter, to take by right of representation, and my son if living, or his children, by right of representation."

By the first codicil to her will the testatrix revoked the gift made by her will to her son of an absolute estate in fee simple in his share of the residue of her estate, and gave to him a life estate therein with a power of disposal by will as set forth in the first codicil.

By the third codicil to her said will, the testatrix made provisions touching the share given to her son and the shares held for the benefit of her daughters, as follows:

"Whereas in the fifth article of my will I provided for an appointment to be made by my daughters to take effect in case of their death without issue, and in the first codicil I authorized

my son to make an appointment, I hereby limit and qualify said powers of appointment in the following manner: It is my will that neither of my daughters nor my son shall have any power of disposing of their respective shares of the estate, real or personal, received from me so as to enable my daughters respectively to limit and appoint in favor of their husbands or my son in favor of his wife more than the income for their lives respectively of my children's shares respectively of my estate, real or personal.

"It is my will that my daughters and son shall have power of disposing of their respective shares of my estate among my lineal heirs, to have and enjoy the same upon such terms and provisions as may be prescribed by my children. The foregoing provisions are made for appointments to take effect in case of the death of any of my children without issue then living.

"It is my will and I do hereby provide that either of my daughters may, notwithstanding she has children, at any time by any deed or writing, executed in the manner prescribed in the fifth article of my will, limit and appoint that her husband may receive for his own use and benefit during his natural life one-third of the income of his wife's share of my estate, both real and personal, and it is further my will that either of my daughters may limit and appoint in the manner aforesaid in what manner and under what conditions and limitations the issue of her children may at their death take and receive their share of my estate coming to my daughters under my will, and made subject to their appointment respectively. And it is further my will that my daughters may limit and appoint in manner aforesaid in what manner and under what conditions and limitations their respective shares of my estate, real and personal, and to whom shall pass in case at the death of my surviving child there shall not be then living any of my lineal descendants."

Jonathan Russell died September 26, 1875, without leaving issue within the meaning of his mother's will; and Geraldine I. Upton, formerly Rivers, died March 29, 1885, leaving three children surviving her, namely, a son, George R. R. Rivers, and two daughters, Mary Rivers and Rosalie Genevieve Sheffield, formerly Rosalie Genevieve Shields, and no issue of any deceased

child. The three children were all born in the lifetime of their grandmother, Lydia Smith Russell.

Rosalie Genevieve Russell, the last surviving child of Lydia Smith Russell, died without issue and unmarried on February 2, 1897, leaving a will which was proved in the Probate Court for the county of Norfolk March 3, 1897. Her will contained the following provisions:

"Ninth. All the property and estate to which under the will and codicils of my mother, the late Lydia Smith Russell, recorded with the records of Probate of this County of Norfolk, I am or may become entitled in possession, reversion, or remainder, or over which under said will and codicils I have any power of appointment, except the articles, if any, hereinbefore specifically given, and except any yearly income or profits of the same received by me or due me at the time of my death, I devise, bequeath, limit, and appoint to my Trustee hereinafter named, to hold the same to her, her heirs, executors, administrators and assigns, but in trust nevertheless to take and receive the said property and all rents, profits, interest, and income thereof, and to pay the net income and profits of said property in quarter-yearly payments in equal shares to and for the respective lives of such of the three children of my sister Geraldine, namely, of my two nieces Mary Rivers and Rosalie Genevieve Sheffield and my nephew George R. R. Rivers, as survive me, and from and after the respective deaths of the said surviving children, I direct the then trustee of this fund to hold or convey such proportion or share of said fund as may have been enjoyed by the decedent for life to such uses and for or to such person or persons, not including George C. Sheffield, husband of my said niece Rosalie Genevieve Sheffield, as the decedent may, by last will and testament, and notwithstanding any coverture, direct and appoint; and in default of such appointment shall convey the said share or proportion to the issue of the decedent in fee and absolutely in equal shares by representation, and if either of the said surviving nieces or nephew die without appointing and without leaving issue him or her surviving, then the share of such niece or nephew shall go to the surviving sisters and brother of the decedent, and to the issue of a brother or sister deceased upon the same terms and with the same provisions

as the original shares as expressed in this clause of my will. If either of my said nieces or my said nephew die before me, but leave issue who survive me, then I direct the trustee to set aside and take from the said fund such portion thereof and in such form as may in my trustee's best judgment be an equivalent for the portion or share which would have gone to the parent during life, and to convey and transfer said share so set aside to the issue of such parent by representation, in fee and absolutely.

"Tenth. All the property given to me by my late uncle Henry B. Smith, and all my other property and estate of whatever nature and wherever situate, and all property over which I now or hereafter may have any power of appointment, or otherwise, or which may not have been hereinbefore fully and sufficiently appointed or limited, I give, devise, bequeath, limit, and appoint to my said trustee hereinafter named, to her, her heirs, executors, administrators and assigns, but in trust to hold the same, to collect the rents, profits, and income thereof and to pay the net income in equal shares to and during the respective lives of my niece Mary Rivers and my nephew George R. R. Rivers; and from and after their respective deaths I direct the then trustee to hold or convey the one-half part or the whole of this fund (as the case may be) for or to such person or persons and in such manner and estate as the said Mary or the said George may by last will and testament appoint; and in default of appointment to convey the same to the issue of the decedent in fee and absolutely in equal shares by representation; and if either die without any appointment and without leaving issue him or her surviving, then his or her share shall be conveyed to the other, the said Mary or the said George or their respective issue by representation, on the same terms as the original shares in this clause of my will contained. In case either the said Mary or the said George die before me, leaving issue who survive me, then I devise and bequeath to such issue, absolutely and in fee and in equal shares, that portion of my said estate in which the parent of such issue if surviving me would have had a life estate under the above provisions in this clause of my will."

At the death of Rosalie G. Russell, the lineal descendants then living of Lydia Smith Russell consisted of Mary Rivers, George R. R. Rivers, and Rosalie G. Sheffield, grandchildren, all living

at the time of their grandmother's death ; ten great-grandchildren, namely, eight children of Rosalie G. Sheffield and two children of George R. R. Rivers, namely, the defendants Robert W. Rivers and Henry F. Rivers. None of the great-grandchildren was living at the death of Lydia Smith Russell.

After the death of Rosalie G. Russell, the trustees under the will of Lydia Smith Russell, being in doubt as to their duties under that will, filed a bill for instructions in this court, making parties thereto, among others, the lineal descendants of Lydia Smith Russell and the trustee under the will of Rosalie G. Russell. After hearing and argument before *Allen, J.*, a final decree was made by him on January 13, 1898, by which it was adjudged, among other matters, that the ninth, eleventh and thirteenth articles of the will of Rosalie G. Russell operated as an effectual appointment of the share of the trust estate held under the will of Lydia Smith Russell, the income of which was payable to Rosalie G. Russell, upon the trust declared in those articles during the respective lives of the three children of Geraldine I. Upton ; but that the validity and effect of the remaining provisions of the articles, and of the rest of the will of Rosalie G. Russell relating to the disposition to be made of that share on the deaths of those children, were not determined. The trustees under the will of Lydia Smith Russell were ordered to pay over and transfer those portions of the trust estate to Mary Rivers, the then trustee under the will of Rosalie G. Russell, in trust for the purposes set forth in the articles named during the respective lives of Mary Rivers, George R. R. Rivers and Rosalie G. Sheffield, and thereafter for such persons as might be found legally entitled thereto. In accordance with this decree large amounts of real and personal property were transferred and conveyed to Mary Rivers in trust as aforesaid.

George R. R. Rivers died on February 11, 1900, leaving a widow, the defendant Helen Rivers, who was living at the death of Lydia Smith Russell, and for issue two children, the defendants Robert W. Rivers and Henry F. Rivers, both minors, and leaving a will which was proved in the Probate Court for the county of Norfolk March 7, 1900. On the same day Helen Rivers and John M. B. Churchill were appointed executors of that will, and on June 27, 1900, they were also appointed trus-

tees thereunder. On the same day Helen Rivers was also appointed guardian of Robert W. and Henry F. Rivers. Churchill died July 29, 1900, leaving Helen Rivers sole surviving executrix of and trustee under the will.

George R. R. Rivers, by the seventh and eighth articles of his will, made the following provisions :

"Seventh. From all my property and estate to which under either the will of my grandmother Lydia Smith Russell or the will of my aunt Rosalie G. Russell or the will of my mother Geraldine I. Upton or to which I am otherwise in any way entitled or may otherwise become entitled in possession, reversion or remainder or over which under said wills, or either of them, I have any power of appointment, I give devise limit and appoint to my wife Helen Rivers and to said John M. B. Churchill, seventy-five thousand dollars In Trust, to hold, manage and safely invest, and to pay the net income thereof to my said wife Helen, for and during her life and from and after her death to pay the income thereof to my children in equal shares ; the issue of any deceased child to take by right of representation ; and, upon the death of the survivor of my said children, said trust to cease.

"Eighth. All the rest residue and remainder of my property of whatever name and nature and wherever situated, including the rest residue and remainder of all property and estate over which I have any power of appointment or disposal or to which I am or may become entitled in possession, reversion or remainder under the said wills of Lydia Smith Russell, Rosalie G. Russell and Geraldine I. Upton, all deceased, I give devise, bequeath, limit and appoint to my children in equal shares in fee simple forever ; the issue of any deceased child to take by right of representation."

The plaintiffs were appointed trustees under the ninth, eleventh and thirteenth articles of the will of Rosalie G. Russell on March 15, 1899, in the place of Mary Rivers, who had resigned the trust, and on the same day were also appointed, in the place of Mary Rivers, trustees under the tenth article of the same will. As trustees under the ninth, eleventh and thirteenth articles they hold, as principal of the trust, personal property exceeding \$100,000 in value, and real estate in Milton of the

estimated value of \$45,000, all of which represents property transferred under the provisions of the decree above referred to or proceeds of property so transferred. George R. R. Rivers during his lifetime received from time to time one third of the net income arising from the fund. Upon his death one third of the principal became payable to the persons entitled thereto, and this one third was necessary to establish the trust fund of \$75,000 created by the seventh article of his will.

The plaintiffs prayed for instructions as to the operation of the foregoing provisions in the wills of Rosalie G. Russell and George R. R. Rivers.

The case came on to be heard before *Knowlton, J.*, who reserved it for the consideration of the full court upon the bill and answers and the agreed fact that George C. Sheffield mentioned in the ninth article of the will of Rosalie G. Russell survived George R. R. Rivers.

R. G. Dodge & J. H. Harwood, for Helen Rivers.

R. D. Ware, guardian *ad litem*, for Robert W. and Henry F. Rivers, children of George R. R. Rivers.

G. M. Cushing, guardian *ad litem*, for the possible issue of the sons of George R. R. Rivers.

G. A. O. Ernst, for Rosalie G. Sheffield, *F. D. Allen*, for Mary Rivers, and *H. Hutchinson*, for the trustees as defendants, submitted the case to the judgment of the court without filing briefs.

H. K. Brown, for the trustees as plaintiffs, filed no brief.

KNOWLTON, J. The first question that arises in this case relates to the effect of that part of the ninth clause of the will of Rosalie G. Russell, which, after appointing the income for life of the property to which she was entitled under the will of her mother to the three children of her sister Geraldine, in equal shares, purports to give the remainder after the death of each of them, "to such uses and for or to such person or persons, not including George C. Sheffield, . . . as the decedent may by last will and testament, and notwithstanding any coverture, direct and appoint."

It is a familiar rule of law that a donee of a power of appointment who is given authority to choose and appoint an object of the power, according to his judgment and discretion, cannot

delegate the exercise of that discretion to another. An attempt to delegate a power of appointment considered merely as an attempted delegation is of no effect. *Ingram v. Ingram*, 2 Atk. 88. *White v. Wilson*, 1 Drew. 298. *Webb v. Sadler*, L. R. 8 Ch. 419. *Carr v. Atkinson*, L. R. 14 Eq. 397. *Williamson v. Farwell*, 35 Ch. D. 128. *Burnaby v. Baillie*, 42 Ch. D. 282. *Topham v. Duke of Portland*, 32 L. J. Ch. 257.

On the other hand it has been held that one having an estate with a power of appointment under which he may give an absolute interest, or may put limitations on the use and enjoyment of that which otherwise would be such an interest, properly may exercise the power by giving one substantially the whole interest in the property and the whole control of it, in the form of a right of personal use and enjoyment during his life, with a right, by deed or will, to appoint persons who shall have it after his death. It has been held in some of these cases that it makes no difference whether the right of disposition in the object of the power to whom the property is appointed by the donee of the power, is by a deed or will, or by will alone. *Morse v. Martin*, 34 Beav. 500. *Slark v. Dakyns*, L. R. 10 Ch. 35.

The creation of such a right is a kind of delegation of the power, but in its nature it is rather a statement of a mode of enjoyment, use, and disposition of that which is virtually an absolute interest. Such an execution of a power by a donee presupposes that the delegated power, if exercised, will give no larger interest than might have been given by the original donee, and will not exceed the limits of the original power.

It is plain that the appointment in the will of Rosalie G. Russell is good, so far as it gives her two nieces and her nephew life estates, respectively. That which remains of her appointment, when taken in connection with that which immediately precedes it, we think must be deemed a continuation of the exercise of the power of disposition of the share of her mother's estate which was given to her under her mother's will, and an attempt to delegate the selection of the beneficiaries. The power to her nephew and nieces to appoint to anybody except George C. Sheffield is void, because it purports to authorize an appointment to others than the objects of the power mentioned in the will

under which she was acting. She could dispose of the estate only among the lineal heirs of her mother Lydia Smith Russell, and she undertook to authorize her nephew and nieces to appoint to others than those heirs.

Whether it was void for other reasons, it is unnecessary to consider.

The attempt to create a power of appointment in her nephew and nieces being of no effect, the next question is, whether, notwithstanding the form of appointment which appears in the will of George R. R. Rivers, these words in Rosalie G. Russell's will are operative, namely: "and in default of such appointment shall convey the said share or proportion to the issue of the decedent in fee and absolutely in equal shares by representation," etc. We are of opinion that they are. The appointment by Rivers under the invalid authority was as if there had been no appointment by him. She intended this disposition of the property to take effect if there should be no effectual appointment by her nephew and nieces. These words give the estate to the defendants, Robert W. Rivers and Henry F. Rivers, unless there is some good ground of objection to giving them effect.

It is truly said in argument that this is a gift to a class, and that the class is to be determined as of the time of the death of Rosalie G. Russell, when her will takes effect. Whether we do or do not assume that the class would open to let in after-born children of George R. R. Rivers is not very material, for no children were born to him after the death of Rosalie G. Russell. If others had been born, even as to them the appointment would not have been too remote under the rule against perpetuities, for their father, George R. R. Rivers, the life tenant under the appointment, was living at the time of the death of Lydia Smith Russell, and the estate would vest in possession in the last of his children at the expiration of a life in being when the will of the original testatrix took effect.

That he was not named in the original will is immaterial, for he is definitely referred to as life tenant in the appointment in the will of Rosalie G. Russell, which is to be taken in connection with the will of Lydia Smith Russell, and for this purpose read as if it were written into the former will.

The appointment to the defendants, Robert W. Rivers and Henry F. Rivers under the will of Rosalie G. Russell, in default of a valid appointment by their father, is good; and the trust estate held for the benefit of George R. R. Rivers during his life, is to be paid over to them in equal shares.

Decree accordingly.

ATLANTIC MUTUAL LIFE INSURANCE COMPANY vs. ANNIE
GANNON & others.

Franklin. May 23, 1901. — June 17, 1901.

Present: HOLMES, C. J., KNOWLTON, LATHROP, HAMMOND, & LORING, JJ.

Insurance, Life, Substitution of beneficiary. Assignment.

A life insurance policy, made payable on the death of B. L., the assured, to M., H. and J., contained a provision permitting the substitution of a new beneficiary with the consent of the company, and provided that no such change should be valid unless signed by the president, secretary or treasurer of the company. The following instrument executed by the assured was assented to by the company in letters signed by its secretary: "I hereby transfer, assign and turn over unto A. G., creditor and relative, all my right, title and interest in Policy No. 2082 issued by the A. M. Life Insurance Company on the life of B. L. and all benefit and advantage to be derived therefrom subject to all the conditions of the contract." The assignee was a creditor to a large amount and the nearest relative of B. L., the assured. *Held*, that the assignment with the assent of the company constituted a change of beneficiary and the substitution of a new one.

BILL OF INTERPLEADER brought by an insurance company against different claimants to the sum payable under a policy of insurance issued upon the life of one Bridget Lawler, filed April 24, 1900.

The case was heard in the Superior Court, by *Hopkins*, J., who ordered the plaintiff to pay the insurance money to the defendants Mary J., Helena and John O'Connor, and, at the request of the defendant Annie Gannon, reported the case for the consideration of this court, such order and decree to be entered as upon the evidence might be just and proper.

The following facts appeared by the report: The policy as originally issued September 8, 1897, to Bridget Lawler was

made payable upon her death to Mary J., Helena and John O'Connor, her nieces and nephew.

The policy bore upon it certain rules of the plaintiff which were made a part of the contract of insurance, among which were the following: "The beneficiary named herein may be substituted at any time at the written request of the assured but any such change to be valid must have the consent of the association. Any change or modification of this contract will not be valid unless signed by the President Secretary or Treasurer of this association."

The assured had no property other than her interest in this policy, and for a period of about fourteen years had lived in the family of her sister, Annie Gannon, one of the defendants, who had furnished to her board, lodging, medical attendance and other necessities during that time. It appeared that the total amount of Annie Gannon's pecuniary claim therefor was about \$1,300.

On December 4, 1899, one W. J. Gannon, a son of Annie, at the request of Bridget Lawler wrote to the plaintiff a letter containing the following: "Can you tell me how Bridget Lawler's policy stands? If premiums are paid up to date? How much would you loan on her policy?"

To this one Edgerton, the secretary of the plaintiff, replied as follows: "Referring to your inquiry of the 4th inst. will say that the premium on the policy of Bridget Lawler referred to is paid to March 1st 1900. The policy can properly be assigned for security or creditor's interest, but the loan value at the present time would be so small as to make it no object for us to consider the matter."

W. J. Gannon then wrote to Edgerton as follows: "Yours of the 8th at hand. Would you please send me an assignment blank, also the number of the policy and the amount it is written for. Is premium paid quarterly or monthly and the amount of same."

The reply signed in the name of the company was as follows: "Yours of the 11th inst. received. Replying thereto will say that the policy inquired about is written for \$1000, with a quarterly premium of \$14.25. The number is 2032. We enclose herein assignment blank as requested."

Gannon then wrote to the company as follows: "Enclosed find assignment of Policy number 2032. Please place same on record. I hold the original of the same."

He received the following reply signed by Edgerton as secretary: "We acknowledge receipt of duplicate assignment of policy No 2032, but owing to the name of the Atlantic Mutual Life Ins. Co. being inadvertently written over the Greenfield Life Association we are obliged to send new blanks, and will remit you the Notary fee when corrected blanks are received. Would inquire if the assignee is a relative of the assured or a creditor; if creditor the assignment should read as follows: 'Annie Gannon creditor (as her interest shall appear).'"

Gannon then wrote: "Yours of the 8th at hand and new assignment forwarded. Please acknowledge receipt of same."

The reply, signed in behalf of the company, was: "We acknowledge receipt of your favor of Jan 9th also new assignment."

The assignment referred to was as follows: "For value received I hereby transfer assign and turn over unto Annie Gannon (creditor and relative) of the City and County of Worcester Commonwealth of Massachusetts all my right, title and interest in Policy No 2032 issued by the Greenfield Life Association of Greenfield, Mass now the Atlantic Mutual Life Insurance Company on the life of Bridget Lawler of said City and all benefit and advantage to be derived therefrom subject to all the conditions of the contract. Witness my hand and seal at Worcester State of Massachusetts this 9th day of January 1900.

Bridget ^{her} × Lawler (S) Witness W J Gannon" Then followed a certificate of acknowledgment.

Bridget Lawler died February 26, 1900, at which time the policy was in force and the three O'Connors and Annie Gannon were alive.

From the time of its execution the policy had been in the possession of the O'Connors, and all the premiums on the policy had been paid by them except the first premium, which was paid by Lawler.

At the hearing it was agreed by all the parties, that all the defendants should interplead and the case be fully heard upon

its merits, and the defendants did so interplead and the case was heard upon its merits. At the hearing, the defendant Annie Gannon asked the judge to rule, that the instrument executed by Bridget Lawler was a valid and efficient assignment and transfer of the policy to her and was a substitution of herself as a new beneficiary under the policy. This ruling the judge refused, and upon the foregoing evidence found for the defendants Mary J., Helena and John O'Connor, and made the decree and reservation stated above.

R. Hoar & J. F. Timon, for Annie Gannon.

E. J. McMahon & J. B. Scott, for the O'Connors.

No counsel appeared for the plaintiff.

KNOWLTON, J. The policy on the life of the assured was made payable to a beneficiary who was not otherwise a party to the contract, and who paid no part of the premium. By the terms of the policy the beneficiary might be changed by the assured with the consent of the company. The beneficiary had no vested interest in the policy during the lifetime of the assured. *May, Ins.* (3d ed.) § 399 M. *Holland v. Taylor*, 111 Ind. 121. *Martin v. Stubbings*, 126 Ill. 387. *Union Mutual Association v. Montgomery*, 70 Mich. 587.

The language of the contract in regard to the change of the beneficiary is as follows: "The beneficiary named herein may be substituted at any time at the written request of the assured but any such change to be valid must have the consent of the association." A general provision as to changes of the contract was in these words: "Any change or modification of this contract will not be valid unless signed by the President Secretary or Treasurer of this association."

The only question in the case is whether there was a change and substitution of beneficiary by the assured with the consent of the association. The answer to this question depends on whether we construe the quoted provision broadly and liberally, or narrowly and strictly. The assured made an assignment of the policy for a valuable consideration to one who was her creditor for a large amount and her nearest relative. This assignment was made on a printed blank furnished for the purpose by the association. The correspondence between the representative of the assured and the secretary of the company shows very plainly that the

change was consented to by the association. Was this a change of beneficiary and a substitution of a new one? The assignment purports to assign and convey all the right, title and interest of the assured in the policy, "and all benefit and advantage to be derived therefrom subject to all the conditions of the contract." The principal "benefit and advantage to be derived therefrom" was the right to receive payment of the stipulated sum after the death of the assured. This constituted the assignee the beneficiary under the policy, and put her in the place of the original beneficiary. In view of the fact that the assured had absolute control of the policy and of all rights under it, provided she acted with the consent of the association, we think it better to hold, in accordance with the manifest intent of the parties, that this assignment made with the company's consent constituted a change of beneficiary as much as if there had been a formal substitution of the second beneficiary for the first, with a reference to the part of the policy in which the name of the beneficiary appeared. It follows that the plaintiff should pay over the amount in controversy to the defendant Annie Gannon.

Decree accordingly.

JOHN FOTTLER, JR. vs. CHARLES W. MOSELEY.

Suffolk. November 21, 1900. — June 18, 1901.

Present: HOLMES, C. J., KNOWLTON, BARKER, HAMMOND, & LORING, JJ.

Deceit, Representations, whether material, what is acting upon, whether loss attributable to.

The question whether certain reported sales of the stock of a corporation are fictitious may have an important bearing upon the conduct of a man holding some of the shares and thinking of selling them, and a false representation knowingly made by a broker, that the reported sales were genuine, which induced such stockholder to retain his shares to his loss instead of selling them, will support an action of deceit, if the jury find that on the facts the representation was material.

For the purpose of supporting an action of deceit refraining from action to the plaintiff's loss in reliance upon the false representations of the defendant in legal effect is acting upon the falsehood. It makes no difference whether a plaintiff has been induced to buy property or to refrain from selling it.

Whether the loss suffered by a director of a corporation from his retaining certain shares of the stock of the corporation which he had intended to sell, after a broker falsely and fraudulently had represented to him that certain reported sales of the stock were genuine, is attributable to the fraud, is a question of fact for the jury.

TORT for deceit, alleging that, relying upon the false and fraudulent representations of the defendant, a broker, that certain sales of the stock of the Franklin Park Land Improvement Company in the Boston Stock Exchange from January 1 to March 27, 1893, were genuine transactions, the plaintiff revoked an order for the sale of certain shares of that stock held for him by the defendant, whereby the plaintiff suffered loss. Writ dated February 17, 1896.

At the trial in the Superior Court, *Hopkins, J.*, at the close of the evidence, directed the jury to return a verdict for the defendant. The verdict was returned as directed; and the plaintiff alleged exceptions. The findings warranted by the evidence are stated in the opinion of the court.

Besides the facts stated in the opinion, the following facts appeared in evidence: During the time in question, and for some time before, the plaintiff had been in the habit of buying and selling stocks through the defendant as a broker; and in January, 1891, the defendant, at the request of the plaintiff, agreed to carry for him, on margin, three hundred shares of Franklin Park Land and Improvement Company stock, which the plaintiff bought of one Moody Merrill. It appeared that Merrill had been an acquaintance of the plaintiff since 1880 or 1881; that the plaintiff and Merrill were co-directors of the Franklin Park Land and Improvement Company from June, 1891, till June, 1893, and were also co-directors in another corporation; that Merrill was president of the Highland Street Railway Company, was a man well known in Boston, and of good reputation until he absconded in June, 1893, when the Franklin Park stock became of little or no value; that after 1892 Merrill and the plaintiff bought and sold stocks on joint account through the defendant.

R. W. Nason, for the plaintiff.

B. L. M. Tower, for the defendant.

HAMMOND, J. The parties to this action testified in flat contradiction of each other on many of the material issues, but the

evidence in behalf of the plaintiff would warrant a finding by the jury, that on March 25, 1893, the plaintiff, being then the owner of certain shares of stock in the Franklin Park Land and Improvement Company, gave an order to the defendant, a broker who was carrying the stock for him on a margin, to sell it at a price not less than \$28.50 per share; that on March 27 the defendant, for the purpose of inducing the plaintiff to withdraw the order and refrain from selling, represented to the plaintiff that the sales which had been made of said stock in the market had all been made in good faith and had been "actual true sales throughout"; that these statements were made as of the personal knowledge of the defendant, and that the plaintiff, believing them to be true and relying upon them, was thereby induced to and did cancel his oral order to the defendant to sell, and did refrain from selling; and that the statements were not true as to some of the sales in the open market, of which the last was in December, 1892, and that the defendant knew it at the time he made the representations. The evidence would warrant a further finding that in continuous reliance upon such representations the plaintiff kept his stock, when he otherwise would have sold it, until the following July, when its market value depreciated and he thereby suffered loss. The defendant, protesting that he made no such representation and that the jury would not be justified in finding that he had, says that even upon such a finding the plaintiff would have no case. He contends that the representation was not material, that a false representation to be material must not only induce action but must be adequate to induce it by offering a motive sufficient to influence the conduct of a man of average intelligence and prudence, and that in this case the representation complained of, so far as it was false, was not adequate to induce action because the fictitious sales were so few and distant in time, and that therefore it was not material.

It may be assumed that the plaintiff desired to handle his stock in the manner most advantageous to himself, and that the question whether he would withdraw his order to sell was dependent, somewhat, at least, upon his view of the present or future market value of the stock; and upon that question a man of ordinary intelligence and prudence would consider whether

the reported sales in the market were "true sales throughout" or were fictitious, and what was the extent of each. It is true that a corporation may be of so long standing and of such a nature, and the number of the shares so great and the daily sales of the stock in the open market so many and heavy, that the knowledge that a certain percentage of the sales reported are not actual business transactions would have no effect upon the conduct of an ordinary man. On the other hand a corporation may be so small and of such a nature and have so slight a hold upon the public, and the number of its shares may be so small and the buyers so few, that the question whether certain reported sales are fictitious may have a very important bearing upon the action of such a man. Upon the evidence in this case, we cannot say, as matter of law, that the representation so far as false was not material. This question is for the jury, who are to consider it in the light of the nature of the corporation and its standing in the market, and of other matters, including such as those of which we have spoken.

It is further urged by the defendant that one of the fundamental principles in a suit like this is that the representation should have been acted upon by the complaining party and to his injury; that at most the plaintiff simply refrained from action, and that "refraining from action is not acting upon representation" within the meaning of the rule; and further that it is not shown that the damages, if any, suffered by the plaintiff are the direct result of the deceit.

Fraud is sometimes defined as the "deception practised in order to induce another to part with property or to surrender some legal right," Cooley, *Torts*, (2d ed.) 555, and sometimes as the deception which leads "a man into damage by wilfully or recklessly causing him to believe and act on a falsehood." Pollock, *Torts*, (Webb's ed.) 348, 349. The second definition seems to be more comprehensive than the first, (see for instance *Barley v. Walford*, 9 Q. B. 197, and *Butler v. Watkins*, 13 Wall. 456,) and while the authorities establishing what is a cause of action for deceit are to a large extent convertible with those which define the right to rescind a contract for fraud or misrepresentation and the two classes of cases are generally cited without any express discrimination, still discrimination is sometimes

needful in the comparison of the two classes of cases. Pollock, Torts, (Webb's ed.) 352.

It is true that it must appear that the fraud should have been acted upon. It is a little difficult to see precisely what is meant by the contention that "refraining from action is not acting upon representation." If by refraining from action it is meant simply that the person defrauded makes no change but goes on as he has been going and would go whether the fraud had been committed or not, then the proposition is doubtless true. Such a person has been in no way influenced, nor has his conduct been in any way changed by the fraud. He has not acted in reliance upon it. If, however, it is meant to include the case where the person defrauded does not do what he had intended and started to do and would have done save for the fraud practised upon him, the proposition cannot be true. So far as respects the owner of property, his change of conduct between keeping the property on the one hand and selling it on the other, is equally great, whether the first intended action be to keep or to sell; and if by reason of fraud practised upon him the plaintiff was induced to recall his order to sell, and, being continuously under the influence of this fraud, kept his stock when, save for such fraud, he would have sold it, then with reference to this property he acted upon the representation within the meaning of the rule as applicable to cases like this. *Barley v. Walford*, 9 Q. B. 197. *Butler v. Watkins*, 13 Wall. 456.

The cases of *Lamb v. Stone*, 11 Pick. 527, *Wellington v. Small*, 3 Cush. 145, and *Bradley v. Fuller*, 118 Mass. 239, upon which the defendant relies, are not authorities for the proposition that "refraining from action is not acting upon representation."

As to whether the loss suffered by the plaintiff is legally attributable to the fraud, much can be said in favor of the defendant, and a verdict in his favor on this as well as on other material points might be the one most reasonably to be expected upon the evidence, especially when it is considered that during the years 1892 and 1893 the plaintiff was a director in the company; but we cannot decide the question as a matter of law. If the fraud operated on the plaintiff's mind continuously, up to the time of the depreciation of the stock in June, 1893, so that he kept his stock when otherwise he would have sold it, and such was the

direct, natural and intended result, then we think the causal relation between the fraud and the loss is sufficiently made out. See *Reeve v. Dennett*, 145 Mass. 23, 29.

Exceptions sustained.

LINDSLEY H. SHEPARD vs. EDWARD M. ABBOTT.

Suffolk. January 9, 1901. — June 18, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

Order, Acceptance, Construction. Agency.

The defendant, a real estate agent, procured for one H., who wished to build a house on a certain lot, a building loan and mortgage for \$10,500. The mortgagee advanced under the mortgage \$4,500 to the mortgagor, and \$6,000 to the defendant. This sum the defendant deposited in a bank in his name as trustee, and drew checks upon it signed as trustee with which he made payments on account of the mortgagor for building materials, lumber and otherwise. H. delivered to the plaintiff, a lumber dealer, an order on the defendant to pay for lumber. The defendant accepted it in the words "Accepted as I am conveyancer for the mortgagee of Lot 5, Lancaster Terrace" and inserted a similar description after his name in the body of the order. The order contained the words "Charge the same to the \$1,800 payment" and also the words "Said order to be paid on or before November 1st, '99." The \$1,800 payment referred to was the last payment to be made upon the building contract and did not become due until after November 1, 1899, and after the date of the writ. The defendant when he accepted the order had in his hands enough of the trust fund to discharge the obligation. In an action on the order, it was *held*, that the defendant was not an agent of the mortgagee but a trustee holding funds of the mortgagor to be applied to the building of the house, and by his acceptance bound himself personally. Whether the words inserted by the defendant in the order, after its execution by the drawer, and the language of the acceptance, limited the defendant's liability to the amount of the trust fund in his hands, was not considered, as he had ample funds in his hands at the time. *Held, also*, that the direction to "Charge the same to the \$1,800 payment" merely indicated to what sum as between the drawer and acceptor the payment of the order should be charged, and that the defendant by his acceptance was bound to pay the order by November 1, 1899, at the latest.

CONTRACT on an order accepted by the defendant to pay the plaintiff the sum of \$993.83 on or before November 1, 1899. Writ dated May 26, 1900.

At the trial in the Superior Court, before *Hopkins, J.*, the following facts appeared. The order sued upon was as follows:

"Brookline, July 24, 1899. E. M. Abbott, Esq., As he is Conveyancer for Lot # 5 Lancaster Terrace, Brookline, Mass. Dear Sir, — Please except [*sic*] and pay to Shephard, Farmer & Co. the sum of \$998.83, nine ninety-three 83/100 dollars, the above being the amount of Bill for Lumber furnished by said firm in full for Lot 5 Lancaster Terrace, Brookline, and charge the same to the \$1,800 payment, said order is as per agreement of order furnished by me, and charge the same to my account. Respectfully, Charles T. Hill. Said order to be paid on or before November 1st, '99."

The following was indorsed upon the back of the order: "Boston, July 24/1899. Accepted as I am conveyancer for the mortgagee of Lot #5, Lancaster Terrace, Brookline, Mass. Edward Miles Abbott, Conveyor."

There was testimony in behalf of the plaintiff tending to show that before July 11, 1899, the plaintiff had been requested to furnish lumber to Charles T. Hill, the maker of the order; that on July 11, 1899, the plaintiff wrote to the defendant the following letter: "Dear Sir, — Under the agreement that you would guarantee that we would be paid for same, the late Mr. O. B. Hill placed with us an order for lumber as follows: [Specifications.] All this lumber will come to about \$900. One car of the spruce dimension is now on the way to Boston, and will be ready for teaming to the job some day this week, but before making such delivery, we must have from you a writing to the effect that we shall be paid for this lumber sometime before November 1, 1899, with interest after 30 days from time of delivery, the time of such payment, either in one or two instalments, to be agreed upon between the parties interested."

That on the receipt of this letter the defendant telephoned to the plaintiff, that it was all right; that no lumber was shipped to Hill until after the receipt of that message; that between the time of the receipt of that message and July 24, 1899, the plaintiff furnished to Hill lumber to the value of about \$210.46, and that the balance of his bill to the amount of the order was for lumber furnished after the acceptance of July 24, 1899; that on July 24, 1899, one Packard, acting for and on behalf of the plaintiff, presented to the defendant the order dated July 24, 1899; that before accepting it, the defendant wrote in the words

after his name, "as he is conveyancer for lot No. 5, Lancaster Terrace, Brookline, Mass.," and then wrote and signed the acceptance indorsed on the back of the order; that subsequently the defendant gave the letter of July 11, 1899, to Packard and requested him to go to the premises and check up the lumber; and that the plaintiff on February 1, 1900, had been paid upon account of the order by the defendant the sum of \$400 by a check upon the National Bank of the Republic, signed "Edward Miles Abbott, Trustee."

The defendant admitted that he signed the acceptance on the back of the order. The defendant further testified, under objections on the part of the plaintiff's counsel, and under a ruling of the judge that the same might be admitted *de bene*, as follows: That he was a real estate agent and insurance broker, and that he had no interest whatever in either lot No. 5 Lancaster Terrace, Brookline, or the building thereon; that on or about May 15, 1899, O. B. Hill, now deceased, father of Charles T. Hill who signed the order, applied to the defendant to procure a loan of \$10,500 on the lot No. 5, and on a proposed building to be erected at a cost of \$11,000 above the land; that he then negotiated with one William E. Stowe to advance to Hill the sum of \$10,500, and thereafter, on May 25, 1899, Elmina D. Hill, in her own right, and Charles T. Hill, her husband, executed and delivered to Stowe, a mortgage on lot No. 5 Lancaster Terrace, and it was recorded in Norfolk Deeds on July 18, 1899; that thereafter the \$10,500 was paid over by Stowe, the mortgagee, as follows: \$4,500 to the mortgagor, and \$6,000 to the defendant; that of the sum of \$6,000 paid over to the defendant, he paid out for and on account of the mortgagor for building material, lumber and otherwise, the sum of \$5,915; that there was now in his hands, out of the moneys advanced to him by Stowe, the sum of \$85 and no more; that the funds so advanced to him were deposited in the National Bank of the Republic, in the name of Edward Miles Abbott, trustee, and were paid out by checks signed "Edward Miles Abbott, Trustee"; that the defendant paid to the plaintiff on February 1, 1900, \$400, by a check on the National Bank of the Republic in the sum of \$400, and signed "Edward Miles Abbott, Trustee." The defendant was asked by the judge if he had authority to sign

the acceptance in the form in which it was signed and delivered, and answered that he did not know. He further stated, however, that he had from time to time paid out money on bills, and had paid other orders executed in the same form, and that Stowe had made no objection thereto. The defendant further testified under objection, the evidence being admitted *de bene*, that before signing the order, the plaintiff's agent had informed him that Hill had applied for lumber, and he understood that the funds would be furnished through the defendant's office; that the defendant replied that the funds were placed there by the mortgagee; that he was not personally responsible; that as the funds were placed in his hands, he could pay them, but in no other way; that it could be paid through his office only as he was furnished with funds.

The defendant further testified, that the \$1,800 payment referred to in the order was the last payment due upon the building contract, and did not become due and payable under the terms of that contract until the house was fully completed and ready for occupancy; that the house was not completed on November 1, 1899, nor was it completed at the time of the trial in the following respects, among others: The papering was not done; the gas fixtures were not in; the grading was not done; and the walks were not laid; and that it would cost about \$800 to complete the building, and make it ready for occupancy as required by the contract. The defendant was asked by his counsel whether he ever intended to bind himself personally on the acceptance, the defendant's counsel intending to show that the defendant never had any such intention. The judge excluded the question, and the defendant excepted.

Upon cross-examination the defendant testified, that he did not know that he ever told the plaintiff the name of the mortgagee; that he had been paid a commission by Charles T. Hill for his work in connection with the mortgage and transaction; that he had been paid nothing by Stowe, the mortgagee, and was to be paid nothing by him; that he did not consult the mortgagee about signing the acceptance in suit; that after accepting the order in question he accepted other orders in favor of people having claims for work or materials furnished for the

house, and had paid them; that his account at the National Bank of the Republic stood in the name of "Edward Miles Abbott, Trustee"; that before and since this transaction he had other funds in that bank in that account; that the mortgagee himself paid some bills contracted in connection with the erection of the building which were to be considered as advances on account of the mortgage. In rebuttal the plaintiff testified that he never knew who the mortgagee was, until the trial. William E. Stowe, the mortgagee, testified, that he had paid upon the mortgage, either by giving cash to the defendant or by paying bills contracted in the erection of the house, at least \$10,500.

At the conclusion of the evidence, the judge struck out all the evidence admitted *de bene*, and the defendant excepted; and thereupon the plaintiff asked the judge to direct a verdict for the plaintiff for the amount of the order, less the sum of \$400 paid on February 1, 1900.

The defendant asked the judge to rule as follows: 1. Upon the evidence, the action cannot be maintained. 2. There is a variance between the declaration and the proof in that the declaration alleges a personal obligation of the defendant, while the acceptance shows that any promise made by him was made in a representative capacity. 3. The acceptance declared on, being a simple contract, oral evidence is competent to charge the defendant's principal. 4. The acceptance not being negotiable, the rule applicable to commercial paper does not apply, and it is immaterial that Mr. Stowe is not named in the acceptance, or whether he is or not liable thereon. The question is whether or not the defendant has used apt words to bind himself personally. 5. If the defendant was without authority to make the acceptance so as to bind his principal, Mr. Stowe, the mortgagee of the lot in question, then the plaintiff's remedy is by an action of tort for false representations. 6. In order to recover, the burden is upon the plaintiff, to show by a fair preponderance of the evidence that the defendant has in his hands, in his capacity as agent or conveyancer for Mr. Stowe, the mortgagee of the lot in question, sufficient funds to pay the acceptance declared on in this action, and that the \$1,800 payment referred to in the acceptance had become due. 7. If the defendant had authority from the mortgagee to make the acceptance in the form in which it was

made, this action cannot be maintained, and the burden is upon the plaintiff to show the want of such authority.

The judge declined to make the rulings, and ruled, that if the defendant signed the indorsement on the back of the order, he was personally liable. The defendant thereupon excepted to the ruling of the judge, and to his refusal of the defendant's requests for instructions.

The jury returned a verdict for the plaintiff; and, at the request of the defendant, the judge reported the case for the consideration of this court. If the above rulings and refusals to rule were correct, judgment was to be entered upon the verdict; otherwise a new trial might be had or such order made as justice might require.

A. M. Lyman, for the defendant.

F. H. Williams & F. M. Copeland, for the plaintiff.

BARKER, J. The case comes up by a report after a verdict for the plaintiff, and by the terms of the report if the rulings and refusals to rule stated in it are correct, judgment is to be entered upon the verdict, otherwise a new trial may be had or such order made as justice may require. Both parties must be taken to have assented to the terms of the report, and we are of opinion that, whether all the rulings and refusals to rule were correct or not, there should be judgment on the verdict.

1. The mortgagee had paid over the whole sum of \$10,500 for which the mortgage was given, \$4,500 of it to the mortgagor directly and \$6,000 to the defendant. In receiving and disbursing the \$6,000, the defendant was in no sense the agent of the mortgagee, but was simply a trustee holding funds of the mortgagor and charged with the duty of seeing that the \$6,000 was applied to the building of the house for which the lumber mentioned in the order was furnished by the plaintiff. In administering the trust he might make himself liable to the mortgagee, but could not render the mortgagee liable to third persons. Such contracts as he chose to make with third persons in administering his trust he alone was liable upon, at least to the extent of the trust fund. We need not inquire whether the language of the order as he saw fit to change it after it was signed by the maker and delivered to the plaintiff, and the language of the acceptance, limited the defendant's liability to the amount of the trust fund in his hands,

because it is conceded that the fund was much larger than the amount of the order, and that after accepting the order he has accepted and paid other orders, and he does not contend that when he accepted this order there was not in his hands enough of the trust fund to discharge the obligation which he assumed by his acceptance. The legal construction of the order in view of the circumstances under which it was given being that the defendant contracted as a trustee and not as an agent the rulings requested upon the law of agency were inapplicable and were properly refused. The final exclusion of the evidence introduced *de bene* by the defendant did him no harm, because it showed that he acted merely as a trustee, and with ample funds to meet the order, and not as an agent.

2. The remaining question is whether the language of the order "and charge the same to the \$1,800 payment" made the payment of the order by the defendant as acceptor conditional upon the becoming due of the \$1,800 payment. But the order itself contained not only an additional general direction by the drawer to charge the same to his account, but the words "Said order to be paid on or before November 1st, '99." In our opinion the legal construction of the order is that it was to become due and be paid on the date given, and that the direction to "charge the same to the \$1,800 payment" merely indicates to what sum as between the drawer and acceptor the payment of the order should be charged. The defendant was not to receive the \$1,800 payment, but was to make it and out of funds already in his own hands as trustee, and by his acceptance was bound to pay the order by November 1, 1899, at the latest.

Judgment on the verdict.

DANIEL F. SLATTERY vs. WALKER AND PRATT MANUFACTURING COMPANY.

Middlesex. January 11, 1901. — June 18, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

Negligence, Employers' Liability, Duty to provide safe appliances, Assumption of risk, Plaintiff's due care.

The proprietor of a factory is liable to an employee injured by an accident, caused by the breaking of the check valve of a hoisting machine, due to the act of the defendant's superintendent in negligently substituting an insufficient valve for the one which came with the machine.

A superintendent in a factory changed the check valve of an oil governed air hoist, taking out the half inch valve that had come with it and inserting in its place a three quarters inch valve, which was guaranteed by its manufacturer to stand a pressure of three or four hundred pounds per square inch. If the whole air pressure of the hoist was turned on without a load being attached to the piston rod, the pressure would be from twenty-seven to twenty-eight hundred pounds per square inch. In about two weeks this valve split, and the superintendent replaced it by another three quarters inch valve of the same kind. He did this without ascertaining how much pressure the new valve would stand or how much it might be subjected to when the hoist was in use. He testified, that he did not consider himself an expert mechanic, and thought the preceding valve split because it had some flaw or defect in it. About ten weeks later, when the plaintiff was about to hook a load on the hoist, he was injured by an accident caused by the new valve splitting in the same way that the preceding one had done. The defendant showed, that the plaintiff had been told never to turn on the whole air pressure when no load was attached, and not to turn on any air pressure at all until it was needed to lift a load, but it appeared, that the only practical way of hooking on a load was to start the hoist slowly rising and to hook on the load as it ascended, that this required an opening of the air valve, that the apparatus in an oil governed air hoist prevents the operator from knowing immediately on opening the air valve how much air pressure has been turned on, and that in operating such a hoist it might happen that the whole pressure was on, without the operator necessarily having made an unreasonable use of the machine. The plaintiff testified, that he did not know whether he had the full head of air pressure on at the time of the accident or not though he "probably" did have it on. *Held*, that these facts would warrant a finding that the defendant did not use due care in furnishing a safe hoist. *Held, also*, that the plaintiff did not assume the risk of the accident, that he was not chargeable with knowledge that the defendant's superintendent had substituted a three quarters inch check valve, not designed to stand the pressure to which it might be subjected, and had never taken the risk of such a hoist. *Held, also*, that the jury were warranted in finding that the plaintiff was in the exercise of due care.

TORT by a moulder employed in the defendant's factory for injuries received while operating a Ridgway oil governed air

hoist, the first count of the declaration alleging a defect in machinery under St. 1887, c. 270, and the second count being at common law. Writ dated October 11, 1899.

At the trial in the Superior Court, before *Gaskill, J.*, it appeared that the plaintiff was forty-five years of age, that he had been a moulder by trade for twenty-eight years before the accident, and that he had been employed by the defendant as a moulder from 1872 to 1879, and again from 1884 until the time of his accident, which occurred on April 21, 1899; that he was employed in the heavy moulding work, and that at the time of the accident he was preparing to lift what he called the top box, weighing about four hundred pounds; that in order to lift this load by means of the hoist it was necessary for him to fasten two iron hooks which were attached to the piston rod of the hoist on to two knobs or projections on the box made for this purpose, which in the factory were usually called "trunnions"; that he had put one hook in place and was holding the other hook in his left hand and was about to hook it to the load when the piston rod of the hoist shot or jumped suddenly into the air; that the hook in his left hand caught him in the left wrist and caused the injury for which he brought this suit; that the air pressure was turned on by him and that the piston rod and the hook in his left hand were both slowly rising when he was attempting to fasten the second hook to the load to be lifted.

It appeared that the accident was caused by the splitting of a check valve, which had been placed in the machine by one Inslee, the assistant superintendent of the defendant's works at Watertown, who had charge of the mechanical department of the works. The evidence, in regard to this and all other material facts, is stated in the opinion of the court.

At the conclusion of the evidence, the defendant asked the judge to direct a verdict for the defendant. The judge refused to do so, but instructed the jury that the plaintiff could not recover upon the first count, based on the employers' liability act. The judge gave full instructions, to which no exceptions were taken, the only exception being to the refusal of the judge to direct a verdict for the defendant.

The jury returned a verdict for the plaintiff in the sum of \$6,500; and the defendant alleged exceptions.

C. Reno, for the defendant.

G. L. Mayberry, for the plaintiff.

LOBING, J. There was evidence that the defendant was negligent in undertaking to improve the hoist by substituting a three quarters inch check valve for the one half inch check valve used in the original construction of the hoist.

The defendant had put one Inslee in "charge of the mechanical department of the defendant's works," including the machine in question. Inslee testified that he noticed that this hoist would sometimes give a jerk when the piston rod was being lowered with the load attached, and that "in order to prevent or remedy this jerking," he had ordered the one half inch Pratt and Cady check valve which came with the hoist removed from the hoist and had had inserted in its place a three quarters inch Pratt and Cady check valve; that, after this substitution was made, the hoist ran "more smoothly and without such jerks as it had previously given," for about two weeks, when one morning "he heard a report," and the piston went up and struck the top of the cylinder. It was found that the three quarters inch valve was split. It appeared that at this time the air pressure was turned on and that there was no load on the hoist. Inslee then put a new valve of the same kind and size on the hoist, and, ten weeks later, the accident in question happened.

It is plain that the defendant company is liable for Inslee's negligence, if he was negligent, in making this change in the hoist. *Ford v. Fitchburg Railroad*, 110 Mass. 240. *Moynihan v. Hills Co.* 146 Mass. 586.

It appeared that Inslee "had no degree as a mechanical engineer," and did not claim to be one; but had done the work of superintending and looking after machinery at three different places where he had been employed before he entered the defendant's employment. He testified that "he did not consider himself to be an expert mechanic; that he had never made machinery and had never made a hoist nor seen one made." He further testified that when he substituted the three quarters inch for the one half inch valve, he did not know how much pressure would come on the valve, but "had learned since the accident that it was twenty-seven to twenty-eight hundred pounds per square inch"; and that "before putting on the valve in question

he did not take any steps to ascertain what pressure it would have to stand, and did not make any test of this valve"; and that "he had heard that the manufacturers of these valves only guaranteed them to stand a pressure of three hundred or four hundred pounds per square inch."

It appeared from the testimony of another witness that he had tested six three quarters inch check valves of the same make as that in question, and that two of the six had not stood the pressure of twenty-seven hundred to twenty-eight hundred pounds per square inch; that one of the six split when subjected to a pressure of twenty-two hundred and seventy-five pounds, and the other, when subjected to a pressure of twenty-six hundred pounds. There was also evidence that the three quarters inch valve which was in the hoist at the time of the accident in question was split in the same way that the first three quarters inch valve was split, ten weeks before. It is manifest that the larger the diameter of the check valve, the less the pressure it would resist, unless it was made proportionately stronger, and there was no evidence that the three quarters inch check valve was made stronger in proportion than the one half inch check valve.

This, then, was a case where the superintendent undertook to substitute a three quarters inch check valve for the one half inch check valve used in the original construction of the hoist, without ascertaining how much pressure the new valve would stand or how much it would, or might, be subjected to when the hoist was in use; and where the new valve split when the air was turned on without a load being attached; and thereupon, a second three quarters inch valve of the same kind was put in, without inquiry being made as to the pressure it would stand or as to the pressure it would be subjected to, and the second valve split as the first did; and finally, where it turns out that these three quarters inch valves were only guaranteed to stand a pressure of three hundred or four hundred pounds to the square inch, while they might be subjected to twenty-seven or twenty-eight hundred pounds per square inch in the hoist where they were put by the defendant, if it happened that the whole air pressure was turned on without the load being attached; and where it also turns out that two of six similar valves when tested did not stand that pressure. This would warrant a finding that the

defendant did not use due care in furnishing a safe hoist. See in this connection *Moynihan v. Hills Co.* 146 Mass. 586.

The defendant seeks to meet this by showing that the plaintiff had been told never to turn on the whole air pressure when no load was attached, and not to turn on any air pressure at all until it was needed to lift a load. But it appeared that in the case of a Ridgway oil governed air hoist, "even if the air valve was left open only a little way, the full head of air pressure would accumulate in the hoist in a short time; that the amount of pressure exerted by the compressed air upon the piston depended upon how long the air valve was left open and upon how wide it was open, and that the piston would receive the full pressure from a small opening in the air valve, if this valve was left open long enough." And the plaintiff testified that the only practical way of hooking on the load to the hoist was to start the hoist rising slowly, and to place the hooks on the "trunnions" of the box containing the load as it ascended.

We are of opinion that the plaintiff did not assume the risk of the accident which happened to him. He was not chargeable with knowledge that the defendant's superintendent had substituted a three quarters inch check valve, which was not designed to stand the pressure to which it might be subjected in the use of the hoist, and he had never taken the risk of such a hoist.

We also think that the jury were warranted in finding that the plaintiff was in the exercise of due care. There was evidence that the only practical way of hooking the hoist on to the trunnions was to start the hoist up, and that an oil governed hoist does not respond directly and in proportion to the extent to which the air valve is opened, but that the amount of pressure may also depend upon the length of time the air valve has been partially open. This, coupled with the plaintiff's testimony that he did not know whether he had the full head of air pressure on at the time or not, though he "probably" did have it on, warranted a finding that he was in the exercise of due care.

The case does not come within the doctrine applied in *Coleman v. Mechanics' Iron Foundry Co.* 168 Mass. 254, 257, that an employer is "not obliged to provide an implement for an improper or unreasonable use." It is evident from what has been said that the apparatus in a Ridgway oil governed air hoist prevents the

operator's knowing, immediately on opening the air valve, how much air pressure has been turned on, and, for that reason, we think it possible that in operating such a hoist it might happen that the whole air pressure was on, without the operator having necessarily made an unreasonable use of the hoist.

The defendant's next defence is that it performed its whole duty to the plaintiff when it purchased a check valve from a reputable manufacturer, within the rule applied in *Reynolds v. Merchants' Woolen Co.* 168 Mass. 501, and *Fuller v. New York, New Haven, & Hartford Railroad*, 175 Mass. 424. To make that rule applicable, the defendant had to take the further step of proving that the valve was made for the use to which it had been put by it; but, in place of that being the fact, it appeared that the maker of the hoist had used a one half inch valve when he constructed it, and that the maker of the three quarters inch valve only guaranteed it to stand a pressure of three hundred to four hundred pounds, while the defendant used it where it might be exposed to a pressure of twenty-seven hundred to twenty-eight hundred pounds.

Exceptions overruled.

GEORGE R. MILLER vs. ALFRED T. HASKELL & others.

Suffolk. January 14, 1901. — June 18, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

Contract, Common counts. Pleading, Declaration. Agency, Broker.

In an action on an account annexed to recover for services rendered at the request of the defendant in the settlement of a claim against a city for damages for land taken under the right of eminent domain, if the amount named in the declaration is the amount which it was agreed the plaintiff should receive, if successful in making the settlement, this does not prevent him from recovering the reasonable value of his services although the settlement was not made by him, if on the evidence the jury could have found that he was entitled to be paid for his services if they were not successful.

A business man employed to perform services, usually performed by a lawyer, in obtaining compensation for property taken by a city under the right of eminent domain, and who at the time he is employed says that he shall charge five per cent upon the amount of money received, is not employed as a broker, and the stipulation fixing his compensation at five per cent, if successful, leaves the compensation to be received by him, if unsuccessful, to be determined by the value of the services rendered.

CONTRACT to recover for services rendered at the request of the defendants in the settlement of a claim against the city of Boston for taking certain land and buildings of the defendants for the laying out and widening of Columbia Road in that city, the first count alleging, that the defendants owed the plaintiff \$950 under an agreement to pay him five per cent of the amount for which he should effect a settlement, and that the plaintiff obtained an offer from the city to settle the claim for \$19,500, but that the defendants wrongfully prevented the plaintiff from completing the settlement, and without notice to him effected a settlement with the city through another, and the second count alleging, that the defendants owed the plaintiff \$950 according to the account thereto annexed. Writ dated December 7, 1898.

At the trial in the Superior Court, before *Hopkins, J.*, the evidence was introduced which is stated in the opinion of the court. At the close of the evidence, the judge, at the request of the defendants, ruled that upon the evidence and under the pleadings the action could not be maintained.

The jury by direction of the judge returned a verdict for the defendants; and the plaintiff alleged exceptions.

J. K. Berry, for the plaintiff.

A. M. Lyman, for the defendants.

LORING, J. The plaintiff had a right to go to the jury on the second count.

Certain land owned by the defendants had been taken by the city of Boston in widening a public way known as Columbia Road. The plaintiff testified that he was employed by the defendants to secure from the city fair compensation for that land, and in pursuance of that employment had spent much time between May 23 and the latter end of July, 1898, when he ascertained that a member of the bar was conducting the case, who asked him "to simply keep quiet." The defendants testified that they made a special arrangement with the plaintiff, by which he was not to be paid for his services unless he was successful in getting from the city more than \$19,500, which had been informally offered to them before they employed the plaintiff. The plaintiff did not succeed in getting a better offer than the \$19,500 previously made before the end of July, when there was evidence that he was dismissed by the defendants because

the street commissioners and the adviser of the mayor of the city of Boston in the matter of real estate refused to have anything to do with the plaintiff in the matter, and that the offer of \$19,500 was subsequently increased and the sum of \$20,900 was paid and received through the efforts of a member of the bar, who denied having requested the plaintiff to keep quiet. This special arrangement was denied by the plaintiff, who testified that at the time he was employed he told the defendants that he should charge "five per cent upon the amount of money received. . . . There was no proviso made, if no settlement should be made; it was not considered at that time; it was considered that the case was placed in my hands to settle." And again: "There was no conversation that I would take the case on the terms 'if no settlement, nothing. . . .'"

The defendants seek to support the ruling directing a verdict in their favor on two grounds: First, on the ground that in both counts the plaintiff alleges that he settled the case, and there is no evidence that he did settle the case. However that may be in case of the first count, it is not true of the second count. In the second count the plaintiff declares on an account annexed, and the count annexed is for "services rendered at your request, in settlement of claim against city of Boston for taking of land and buildings for laying out and widening of Columbia Road." Under that count the plaintiff can recover the reasonable value of his services, even though the amount named in the declaration as the amount due for those services is the amount to which he would have been entitled had he been successful in settling the case. Therefore, so far as the question of pleading goes, the plaintiff was entitled to recover the reasonable value of his services, and the only question left is whether, under the arrangement testified to by him, the jury could have found that he was entitled to be paid for his services if they were not successful.

Second: The defendants contend that the plaintiff was not entitled to be paid for his services, because a broker who is not successful is not entitled to any compensation. It is true that in this case the plaintiff, by his own testimony, was to receive a commission of a specified amount if he was successful in settling the case on terms satisfactory to the defendants; but that commission was not a brokerage commission; the plaintiff was not

a broker, and was not employed as a broker; he was a business man, and he was employed to perform services ordinarily performed by a lawyer, namely, to obtain compensation for property taken by the city of Boston under the right of eminent domain. The stipulation, that he was to receive a commission of five per cent on the amount received by the defendants in case he was successful in obtaining a settlement of the claim satisfactory to them, was merely a stipulation fixing the compensation which he was to receive for his services in that contingency, leaving the compensation to be received by him, if he was not successful, to be determined by the value of the services rendered.

Exceptions sustained; new trial granted.

FRANCES B. BROSTROM vs. CHARLES LAUPPE.

Norfolk. January 16, 1901. — June 18, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

Nuisance. Fence.

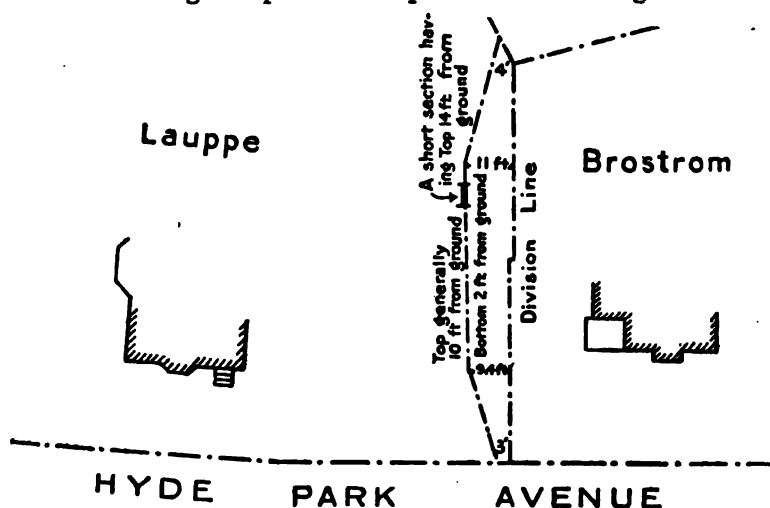
St. 1887, c. 348, providing that a fence unnecessarily exceeding six feet in height, maliciously erected or maintained for the purpose of annoying the owners or occupants of adjoining property, shall be deemed a private nuisance, and giving a remedy for damages sustained thereby, does not apply to a fence which is not on or near a division line. A fence from three to ten feet from a division line and extending its entire length is not on or near it.

TORT under St. 1887, c. 348, to recover damages caused by the malicious erection and maintenance of a fence unnecessarily exceeding six feet in height. Writ dated June 3, 1899.

At the trial in the Superior Court, before *Bond, J.*, without a jury, it appeared, that the plaintiff was the owner in fee of a certain lot of land with a dwelling house thereon on the easterly side of Hyde Park Avenue, a public highway in the town of Hyde Park, and the defendant was the owner in fee of another tract of land on the same avenue, adjoining the land of the plaintiff on the northerly side thereof, the line between the two estates being about ninety feet in length; that the fence com-

plained of was erected on the land of the defendant; that it began about three feet distant from the front fence of the defendant, and extended substantially the entire length of the lot, and was from three to ten feet from the dividing line between the estates; that the plaintiff's residence was situated about eighteen feet from the dividing line, and the defendant's residence about fifty feet from that line.

The following is copied from a plan used at the argument.



The judge found as a fact, that the fence was maliciously erected and maintained by the defendant for the purpose of annoying the owner and occupant of the adjoining property. He ruled, that the fence, being erected on the defendant's land from three to ten feet from the boundary line between the defendant's land and the land of the plaintiff was not within the provisions of St. 1887, c. 348, and for this reason only found for the defendant. The plaintiff alleged exceptions.

E. C. Jenney, for the plaintiff.

J. A. Halloran, for the defendant.

LORING, J. With some hesitation we have come to the conclusion that the ruling was right. We do not agree with the defendant's argument that the word "fence" means a division fence. But we do think that the statute must be construed in the light of the kind and the extent of the restriction which the Legislature intended to impose, and, so construed, we are of

opinion that the fence, which is wholly on the defendant's own land and, except for the wings at the two ends of it, is nine feet and one half to eleven feet distant from the division line between the two estates, is not within St. 1887, c. 348.

In *Rideout v. Knox*, 148 Mass. 368, the purpose and extent of the act are considered at length. It was there shown that it was not intended to curtail the use of land generally, nor to curtail the owner's rights to those uses of the land, which are the immediate rights of ownership, but that it was limited to curtailing a more or less necessary incident of ownership, namely, erecting a fence for the sake of annoying a neighbor; and in this connection it was said: "It is at least doubtful whether the act applies to fences not substantially adjoining the injured party's land." In *Smith v. Morse*, 148 Mass. 407, it was held that the act did not create an easement in the plaintiff. And, finally, it was held in *Spaulding v. Smith*, 162 Mass. 548, that the language of the act is not to be taken technically, and that a fence on the other side of a public highway was not within the statute, though the plaintiff and the defendant were owners of adjoining lands by owning to the centre of the way. The fence in *Rideout v. Knox*, 148 Mass. 368, was erected "against the fence which stood on the line dividing the estates of the parties." In *Smith v. Morse*, 148 Mass. 407, it was alleged in the declaration that the fence was "on or near the line between the plaintiff's said premises and the said premises owned or occupied by the defendant." In *Rice v. Moorehouse*, 150 Mass. 482, it is stated in the bill of exceptions that the fence was "on or near the line between her [the defendant's] land and land of plaintiff." In *Lord v. Langdon*, 91 Maine, 221, relied on by the plaintiff, the fence complained of was "about two feet from the division fence separating the two lots."

Construing the statute in the light of the extent and purpose which the Legislature had in mind, we are of opinion that it does not apply to a fence which is not on, or near, the division line.

Exceptions overruled.

SHADY HILL NURSERY COMPANY *vs.* JOHN WATERER
AND SONS.

Suffolk. January 16, 1901. — June 18, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

Contract, What constitutes. Sale, Order for goods.

The plaintiff, a dealer in nursery stock, wrote to the defendant in England, who had previously filled orders for him, stating that he should want certain rhododendrons and other plants for the coming season, enumerating the sizes of the plants and the number of each size wanted, adding "Kindly inform us by return mail the cost of these plants and we will cable as to filling order." The defendant answered giving the prices of the plants wanted, except of one size of rhododendrons which he could not supply. In this letter the defendant suggested a cable code by which, if the plaintiff should cable the words "Light," "Medium" and "Extra," he would be understood to order respectively three of the sizes of rhododendrons at the prices named in the letter. In reply the plaintiff cabled "Ship as ordered." The defendant made no reply and shipped no goods. The plaintiff procured rhododendrons in this country at higher prices than those named by the defendant, and sued the defendant for failure to ship the rhododendrons named in the defendant's letter. *Held*, that there was no contract, that the message was not equivalent to an order to the defendant to ship such of the rhododendrons mentioned in the plaintiff's letter as the defendant had stated prices for, and there had been no order to which the message "Ship as ordered," might refer, and it naturally might refer to an order by mail on its way or to be sent.

CONTRACT for breach of an alleged agreement of the defendant to ship certain rhododendrons to the plaintiff. Writ dated December 9, 1898.

At the trial in the Superior Court, before *Richardson, J.*, the plaintiff's evidence was introduced as stated in the opinion of the court, whereupon the judge directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions.

J. E. Hannigan, for the plaintiff.

M. M. Weston, for the defendant.

BARKER, J. The plaintiff dealt at wholesale and retail in nursery stock at Bedford and Boston in this State, and the defendant, having nurseries in Bagshot, England, had filled orders for the plaintiff. In October, 1895, the plaintiff mailed a letter inquiring about certain plants which it desired for the next

spring, and the letter was not received. On February 10, 1896, the plaintiff again wrote, stating that such an inquiry had been made in the October letter, and saying "We repeat the inquiry. We shall want 500 Rhododendrons, 18 inches, with buds; 400 Rhododendrons, 24 inches, with buds; 300 Rhododendrons, 36 inches, with buds." Then follow certain requirements as to quality, varieties and colors, after which the letter continues, "We shall also wish twenty-five Rhododendrons, 4 to 5 feet, in different colors. Kindly inform us by return mail the cost of these plants and we will cable as to filling order. We are likely to want the following list of evergreens, in good shape. Trees to be five feet. Please inform us the cost of them, and we will advise you by cable as to shipping them." Then follows a list of twenty-three evergreens, and the letter continues "It is likely we may wish these and will advise you at once after receiving your letter. You may also price the following" giving a list of five other varieties of plants.

On February 21, 1896, the defendant wrote acknowledging the receipt of the letter of the tenth, naming prices for the five hundred, the four hundred, and the twenty-five rhododendrons, stating that the defendant could not offer the three hundred, thirty-six inches, but naming a price for three hundred, thirty inches in size, and also naming prices for some of the evergreens and for the other five kinds of plants. In this letter the defendant suggested a cable code by the use of which if the plaintiff should cable the words "Light," "Medium" and "Extra" the message would be taken by the defendant to order it to send the five hundred, the four hundred and the twenty-five rhododendrons at the prices named in the letter. In reply to this letter the plaintiff on March 6, 1896, cabled "Ship as ordered."

The plaintiff considered this message as the closing of a contract whereby it bought of the defendant five hundred eighteen inch rhododendrons at the price of £6/5 per hundred, four hundred twenty-four inch, at £7/10 per hundred, and twenty-five four to five feet at 10s. 6d. each. The defendant did not so consider the message, made no reply, and sent no goods. On April 15, 1896, the plaintiff cabled "Telegraph date shipment", to which the defendant replied "Not shipping. Can supply none", and on the same day wrote the plaintiff as follows: "We

are exceedingly sorry to find from your cables received that there appears to have been some mistake with regard to your order. We have been under the impression that you did not require any of the plants, but on turning up your correspondence we find that only the Junipers were not wanted. As we could now only supply one or two of the items you require we thought it best not to send any, and cabled you this morning to that effect. We are very sorry any mistake should have occurred, and seriously trust it will not have inconvenienced you to any great extent." On April 15 it was too late in the season to bring out rhododendrons from England, and to supply its trade the plaintiff bought plants in this country at an expense of \$400 more than they would have cost if sent at the price offered in the letter of February 21 upon the receipt of the message "Ship as ordered."

At the trial the plaintiff contended that it could recover the extra expense, but the court instructed the jury to return a verdict for the defendant, and the case is here upon the plaintiff's exception to the instruction.

The letter of February 10 was not an order for any plants. As to rhododendrons it told ~~the~~ defendant that the plaintiff would want certain plants, asked information as to their cost and said that the plaintiff would "cable as to filling order." The letter did not say that the plaintiff would buy the rhododendrons if the prices should be satisfactory, and it committed the plaintiff to nothing more than to reply by cable if the defendant should send a list of prices. In sending the list the defendant suggested a cable code in which were three words which if used by the plaintiff in its reply would mean that the defendant was to send the three kinds of rhododendrons which it could supply at the offered prices. While the plaintiff was not bound to use the suggested code, if it did not do so, in order to bind the defendant by a contract, it must reply in language which ought to be understood by the defendant to mean that the plaintiff thereby ordered of the defendant certain goods at certain prices. This the message "Ship as ordered" did not do. There had been no order. The message might naturally refer to an order on its way by mail or to be so sent. It could not be understood to require the defendant to send plants, as to which

the only communications between the parties had been a statement that the plaintiff would want them, a request for information as to prices with a promise to cable as to filling an order, replied to by a list of prices for such of the plants as could be furnished, accompanied by a suggestion of the form as to which the cable as to filling the order should take if the plaintiff desired the defendant to send those of the rhododendrons which the plaintiff had said it should want and which the defendant could furnish. The message was not equivalent to an order to the defendant to send such of the rhododendrons mentioned in the letter of February 10 as the defendant had stated prices for. If so intended by the plaintiff it was not in terms which the defendant ought so to have interpreted or understood, and as it did not so understand them, there was no contract.

Exceptions overruled.

CAUSTEN BROWNE & others vs. CITY OF BOSTON & another.

Suffolk. January 24, 25, 1901. — June 18, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

Municipal Corporations, Limitation of indebtedness. Boston, St. 1885, c. 178.

The city authorities of Boston desired to acquire certain land adjoining land of the city used for a hospital. The price of the land was \$226,000. The borrowing capacity of the city under St. 1885, c. 178, limiting its indebtedness was but little over \$24,000, and it had no money in its treasury available for the purchase of the land. It was arranged with the owners of the land that they should mortgage it to third parties for \$202,000 and the city should buy it subject to the mortgages for \$24,000. The mortgages were to be payable three years after the conveyance to the city, with a privilege to the owners, their grantees and assigns to pay them off before maturity. The city was not to be mentioned in the mortgages and the deeds to the city were to contain the statement, that the city was not to be held liable in any way for the payment of the mortgages or the interest thereon. Upon a petition of more than ten taxable inhabitants of Boston, under St. 1898, c. 490, to enjoin the city from carrying out the transaction, it was held, that the proposed action of the city must be enjoined as an attempted evasion of St. 1885, c. 178, and within its prohibition; that the transaction was in substance and effect a purchase of the land by the city for the sum of \$226,000 of which it was to pay \$24,000 in cash and the rest in three years with interest, with the privilege of paying sooner, and this notwithstanding the fact that the city could not be sued for the balance of the purchase money, the manner in

which the indebtedness was created being immaterial, if the result was to subject the city to a present liability, direct or indirect, which the taxpayers eventually would be called upon to meet.

MORTON, J. This is a petition under St. 1885, c. 178, § 8, and St. 1898, c. 490, by more than ten taxable inhabitants of Boston to restrain the city and its treasurer from purchasing and paying for certain parcels of land in that city on the ground that the debt limit provided by St. 1885, c. 178, § 2, will be exceeded thereby. The case was heard on the petition, answer and agreed facts and reserved for the consideration of the full court.

From the agreed facts it appears that the city of Boston owns certain premises which are occupied and used as an insane hospital and are under the control of a board of trustees. Prior to October 30, 1899, the trustees "requested the mayor of the city to make an appropriation to buy various parcels of land . . . for the purposes of the hospital, and among other parcels" the land in question. The mayor laid the communication, as provided by law, before the board of estimate and apportionment. St. 1898, c. 434, § 4. That board made an arrangement with the owners of the land "by which the city of Boston agreed to buy, in the manner hereinafter described, and the owners to sell, said parcels for the following prices." Then follows a statement of the price per foot of each of the different parcels amounting in all to \$226,000. It was arranged with the owners of the land that they should mortgage the same to third parties for \$202,000 payable with interest after three years from the conveyance to the city with a privilege reserved in the mortgages to the owners, their grantees and assigns to pay the mortgages and interest at maturity or earlier if they should so desire. These mortgages were to be placed on the land before it was conveyed to the city, and it was arranged that the land should be conveyed subject to them but that the city should not be mentioned in them and that the deeds should contain the statement that the city was not to be held liable in any way for the payment of the mortgages or the interest thereon. The board of estimate passed an order appropriating \$24,000 for the purchase of the equity in the land, and authorizing the city treasurer to issue from time to time bonds to that amount for that purpose, and directing the trustees of the Insane Hospital to expend the

appropriation for that purpose. This order was duly submitted by the mayor to the city council and was passed by the board of aldermen and the common council, and was approved by the mayor prior to December 12, 1899. None of the mortgages had been given or recorded at the time of filing this petition. The officers of the city propose to carry out the agreements that have been made for the purchase of the land and on the delivery of the deeds the city is to take possession of the land. On October 30 and since, the borrowing capacity of the city under the statutes limiting its indebtedness was and has been but little over \$24,000. The assessed valuation of the land is \$33,800, and the owners of it have been admitted as parties to this suit.

It is obvious that if the arrangements which have been entered into between the city and the owners of the land are valid and binding, an easy method will be afforded by which cities and towns in this and similar cases can evade the statutes relating to municipal indebtedness. Without meaning to intimate whether it would stand any better if it were, the transaction does not seem to us to be in any just sense a letting and hiring with a right of purchase. Nor does it constitute, we think, an agreement whereby the city acquires a buyer's option on the lands in question even if we assume that a city or town may properly enter into such an arrangement. Neither do we think that the transaction can be regarded merely as the purchase of an equity of redemption, assuming that such a purchase is within the power of a city or town. What the parties contemplate and manifestly intend is a sale by the owners and a purchase by the city of the lands in question, and the arrangement, which has been entered into, has been made, it is plain, for the purpose of evading, if possible, the obstacle interposed by the statutes in regard to municipal indebtedness. It is expected and intended that the city shall ultimately pay the mortgages. Otherwise the arrangement so far as the owners are concerned is a singular one. They receive \$24,000 in cash and they bind themselves to pay \$202,000 on property which is assessed for \$33,800. The transaction is in substance and effect a purchase of the lands by the city for the sum of \$226,000, of which it pays \$24,000 in cash and is to pay the rest in three years with

interest with the privilege of paying it sooner if it desires. It is true that no action could be maintained against the city for the balance of the purchase price and that in that sense the city would not be indebted for such balance. But the property when conveyed will be subject to the mortgages that have been placed upon it pursuant to the arrangement that has been made, and the city either will have to pay them or submit to have the property taken from it by foreclosure proceedings. It will thus become indirectly liable for the amount secured by the mortgages, and the taxpayers will ultimately be obliged to pay it as contemplated. In a sense, therefore, it might be said, if this arrangement were carried out, that the city would be indebted for the sums secured by the mortgages. Certainly no account of its assets and liabilities would be correct which omitted this property from the one and the amount for which it was mortgaged from the other. Moreover, there is authority for the proposition that if the city had itself mortgaged the property and had stipulated in the mortgages that it should not be liable, but that the mortgagees should look to the land alone, such a transaction would be within the prohibition of the statute and would not be upheld. *Baltimore v. Gill*, 31 Md. 375. *Earles v. Wells*, 94 Wis. 285.

The object of the statute is to protect the taxpayer by confining the indebtedness of the city within a prescribed limit. The manner in which the indebtedness is created is immaterial if the result is to subject the city to a present liability direct or indirect which the taxpayers eventually will be called on to meet. It seems to us that such will be the result of the ingenious scheme that has been devised in the present case. We think that the statute cannot be evaded in the manner proposed. See *Ironwood Water-Works Co. v. Ironwood*, 99 Mich. 454; *Baltimore v. Gill*, *ubi supra*; *Newell v. People*, 3 Selden, 9; *Reynolds v. Waterville*, 92 Maine, 292; *Earles v. Wells*, 94 Wis. 285.

Decree for petitioners.

N. Matthews, Jr. & H. L. Harding, for the petitioners.

A. J. Bailey, for the city of Boston and the city treasurer.

G. R. Nutter, (*J. G. Palfrey* with him,) for George W. Seaverns, owner of one of the parcels of land.

G. R. Swasey, for John F. Callahan and James J. Costello, owners of the other parcels.

LAURENCE MINOT & another, trustees, *vs.* CHARLES U.
COTTING & another, trustees.

Suffolk. March 5, 1901. — June 18, 1901.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

Encumbrances, St. 1889, c. 442, To determine validity and extent of. *Easement*, In fee not freehold. *Land Registration Act*.

The owner of an easement in fee in a private way adjoining his land is not a "person having a freehold estate" within the meaning of St. 1889, c. 442, giving such person a remedy to determine the validity, nature or extent of certain encumbrances "when the title to land" appears to be affected.

Semle, that the provision of the Land Registration Act, St. 1898, c. 562, § 19, that a person claiming "to own the legal estate in fee simple" may apply for registration of his title, does not include one claiming to own an easement in fee simple.

A petition, under St. 1889, c. 442, to determine the nature and extent of the rights of way claimed by the respondents, under a certain deed, in and over a private way called Townsend Place in Boston, alleged, that the petitioners were the owners of certain lots of land situated on Townsend Place with the buildings thereon together with a right of way and of drainage in, upon, and over said Townsend Place as appurtenant to said lands. *Held*, that it was the title to the right of way and not the title to the land of Townsend Place that was intended to be and was the subject of the petition.

PETITION under St. 1889, c. 442, to determine the nature and extent of encumbrances in Townsend Place, a private way leading out of Carver Street in Boston, filed May 26, 1900.

The respondents demurred to the petition, the principal ground of demurrer being that the petitioners had not a freehold estate in the premises within the meaning of the statute. The case was heard by *Barker, J.*, who sustained the demurrer and ordered the bill to be dismissed, and, with the consent of the parties, reported the case to the full court to be determined on the pleadings.

H. E. Warner, for the petitioners.

W. L. Putnam, for the respondents.

MORTON, J. This is a petition under St. 1889, c. 442, to determine the nature and extent of the rights of way claimed by the respondents and reserved to them by deed in and over a private way called Townsend Place which runs easterly and

southerly from Carver Street in the city of Boston. The petitioners are the owners of certain premises bounded northerly and westerly by said way, and extending to the centre of the way so far as it bounds said premises on the west, with a right of way appurtenant thereto in said Townsend Place. The respondents are the owners of certain premises situated on the northerly side of said way and between Carver Street and the premises of the petitioners.

One question and the principal one in the case is whether the petitioners as the owners of an easement in the way have such a title as will enable them to maintain this petition. The statute provides that, "When the title to land appears of record to be affected by a possible condition, restriction, reservation, stipulation or agreement made or imposed more than thirty years prior to the commencement of the proceedings hereinafter provided for, any person having a freehold estate, vested or contingent, in possession, reversion or remainder, in said land, or in any undivided or any aliquot part thereof, or any interest therein which may eventually become a freehold estate, and any person who has conveyed such estate or any such interest therein with covenants of title or warranty, may file a petition in the supreme judicial court for the purpose of determining the validity or defining the nature and extent of such possible condition, or other incumbrance, against any person who might be entitled in any event to claim to set up the same or to enforce or avail himself thereof." The petitioners contend that as owners of an easement in fee in the way they are possessed of a freehold estate in land which may be affected by reservations or restrictions or stipulations in the deeds under which the respondents claim and that therefore they are entitled to maintain this petition. But we think it is plain that the statute makes an interest as owner in the land that is affected, or a liability which may arise from having conveyed such interest with covenants of title or warranty the basis of the right to bring a petition under it, and not the ownership of an easement in such land. It is "when the title to land" may be affected by a possible restriction, etc. that a petition may be proper. And it is "any person having a freehold estate, vested or contingent, in possession, reversion or remainder, in said land, or in any undivided or any aliquot part

thereof, or any interest therein which may eventually become a freehold estate," who may bring the petition. These words more naturally describe an interest as owner in the land itself than they do an interest as owner of an easement. Again, the statute provides in section one, that "Two or more such defects of the same general character in a title to the same parcel of land or to different portions of the same parcel of land may be set forth in the same petition," etc., recognizing still further that an ownership in the land in some form is the basis of the proceedings. In some of the previous statutes where the right to bring a petition has been given to persons "in possession of real property, claiming an estate of freehold therein," Pub. Sts. c. 176, § 1, St. 1898, c. 340, § 1, express provision has been made for persons in the enjoyment of an easement, which would tend to show that otherwise they would not have been regarded as in the possession of a freehold estate within the meaning of the statute.

There is no provision in the Land Registration Act for an application by the owner of an easement for the registration of his title, (St. 1898, c. 562, § 19,) and, so far as we know, except in the cases above referred to, there is no provision for a petition by the owner of an easement to have his rights determined. It seems to us, therefore, that the statute was not intended to afford a remedy by which owners of easements in the same land could have the nature and extent of their rights settled, and should not be so construed.

The petitioners further contend that they have a right to maintain their petition as the owners in fee to the centre of so much of the way as bounds their premises on the west and also as the owners in fee of a piece about seven feet square of that portion of Townsend Place on which the respondents' premises abut lying on the opposite side of the way and easterly of the respondents' premises. But we think that the petition does not properly set out any such claim. The allegations are that the petitioners are the owners in fee of certain lots of land situated on Townsend Place "with the buildings thereon, together with a right of way and of drainage in, upon, and over said Townsend Place as . . . appurtenant to said lands"; that the respondents claim as trustees under the will of one

Williams to be the owners of certain premises abutting on Townsend Place, which is their southern boundary, conveyed to said Williams by deed; that the respondents further claim that as owners of said land they and their agents, servants and tenants are entitled under and by virtue of the grants contained in the deeds to said Williams to free and uninterrupted passage on foot and with horses and vehicles of all kinds to and from their premises through Townsend Place to Carver Street and that they are actually so using said Townsend Place; that the deeds under which the respondents claim affect the title to Townsend Place with possible conditions and restrictions and that the petitioners have a freehold estate as set forth in the petition in the land known as Townsend Place and bring their petition to have the validity and nature and extent of such possible encumbrance determined. The natural construction of this petition is, it seems to us, that it relates to the right of way in Townsend Place that was appurtenant to the land belonging to the petitioners and that their title and freehold estate in Townsend Place was such as they had by virtue of their ownership of the right of way. There is no allegation that the petitioners are the owners in fee of a portion of Townsend Place which is affected by possible restrictions, as it seems to us that there should have been if that was relied on by them. The only title or interest in Townsend Place which is set forth *in totidem verbis* is the right of way. If the title in fee to the land in Townsend Place was intended to be the subject of the petition, the allegation that the petitioners had a right of way in Townsend Place was superfluous. If the title to the right of way was intended to be the subject of the petition then no allegation respecting the title to the fee of the land in Townsend Place was necessary. And inasmuch as it is alleged that the petitioners had a right of way in Townsend Place as appurtenant to the land owned by them and there is no allegation respecting their title to the land in Townsend Place it would seem that the fair inference must be that it was the title to the right of way and not the title to the land of Townsend Place that was intended to be and was the subject of the petition.

We think that the demurrer was rightly sustained and the bill was rightly dismissed.

Bill dismissed.

SILAS S. SEAYER, administrator, *vs.* RICHARDS BRADLEY,
trustee.

Suffolk. March 6, 1901. — June 18, 1901.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

Carrier, Of passengers. Elevator.

One maintaining a passenger elevator in an office building is not a common carrier of passengers within the meaning of Pub. Sts. c. 73, § 6, giving a remedy for the loss of life of a passenger by reason of the negligence of "common carriers of passengers."

TORT under Pub. Sts. c. 73, § 6, to recover for the loss of life of the plaintiff's intestate by reason of the negligence of the defendant, alleged to be a common carrier of passengers, operating a passenger elevator in the building owned and managed by him as trustee numbered 171 A on Tremont Street in Boston. Writ dated December 7, 1898.

At the trial in the Superior Court, before *Sheldon, J.*, the counsel for the plaintiff, in his opening to the jury, stated that he proposed to show that the building was an office building, consisting of six floors occupied by various tenants; that an elevator ran from the street floor to the top of the building, and was maintained by and under the control and management of the defendant, for the use of the tenants and their employees, and those who for any purpose desired to visit them; that the plaintiff's intestate worked for one of the tenants on the fifth floor of the building, and the accident happened while the plaintiff's intestate, being in the exercise of due care, was in the elevator being carried up to his place of business; that he was instantly killed by reason of the gross negligence of the defendant's servant or agent in operating the elevator, and on account of the gross negligence of the defendant in allowing the elevator to get out of repair so as to render it dangerous for passengers therein in the exercise of due care; and that the elevator had been out of repair and defective for a long time and was dangerous for passengers riding therein, all of which the defendant well knew.

At the conclusion of the opening, the judge asked the plaintiff's counsel if he contended that he could recover if the defendant was held not to be a common carrier of passengers. The plaintiff's counsel answered that unless the defendant was held to be a common carrier of passengers, at least as far as the plaintiff's intestate was concerned, he could not recover. The judge thereupon ruled that the defendant was not a common carrier of passengers, and ordered the jury to render a verdict for the defendant.

The jury returned their verdict as directed ; and the plaintiff alleged exceptions.

J. E. Young, (*F. J. Daggett* with him,) for the plaintiff.

J. Lowell & J. A. Lowell, for the defendant.

HOLMES, C. J. Those who maintain a passenger elevator in an office building are not "common carriers of passengers" within the meaning of Pub. Sts. c. 73, § 6. We assume that that section is not prevented from applying because it represents a statute passed before such elevators were in familiar use. But the words do not describe the owners of an elevator. The modern liability of common carriers of goods is a resultant of the two long accepted doctrines that bailees were answerable for the loss of goods in their charge, although happening without their fault, unless it was due to the public enemy, and that those exercising a common calling were bound to exercise it on demand and to show skill in their calling. Both doctrines have disappeared, although they have left this hybrid descendant. The law of common carriers of passengers, so far as peculiar to them, is a brother of the half blood. It also goes back to the old principles concerning common callings. Carriers not exercising a common calling as such are not common carriers whatever their liabilities may be. But the defendant did not exercise the common calling of a carrier, as sufficiently appears from the fact that he might have shut the elevator door in the plaintiff's face and arbitrarily have refused to carry him without incurring any liability to him. Apart from that consideration, manifestly it would be contrary to the ordinary usages of English speech to describe by such words the maintaining of an elevator as an inducement to tenants to occupy rooms which the defendant wished to let.

The only question before us is the meaning of words. Therefore decisions that the liability of people in the defendant's position is not less than that of railroad companies do not go far enough to make out the plaintiff's case.

Exceptions overruled.

JAMES M. BIGELOW, executor, *vs.* NANCY M. PIERCE,
administratrix, & others.

Worcester. March 6, 1901. — June 18, 1901.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

Devise and Legacy, Construction.

A will contained this provision: "I do hereby give and bequeath to my legal heirs all my estate of every description with the exclusion of my brother L.'s heirs, and it is my will that they shall have no part or parcel of my estate; also that part that would legally belong to my brother S. I do hereby order to be held in trust by my said executor and the income to be paid by my said trustee to the said S. yearly, and when in the opinion of my said trustee that the said S. or any of his family need it for their necessary support then my said trustee is at liberty to pay over the whole or any part of the principal as he may deem best." At the time of the testator's death he held three notes against S. the earliest of them dated after the execution of the will. There was nothing to show that when the will was executed S. was indebted to the testator or that it was expected that he would be. *Held*, that, in ascertaining the "part that would legally belong" to S., the word "legally" should not be interpreted in its strict and technical sense, and that the indebtedness of S. to the testator should not be deducted.

PETITION by the executor under the will of Nancy Pierce, late of Grafton, to have the amount of indebtedness of Silas A. Pierce, a legatee under the will, to the testatrix determined and deducted in ascertaining the part to which the said Silas legally would be entitled under the will, filed in the Probate Court for the county of Worcester October 12, 1898.

In the Probate Court, *Forbes, J.* made a decree dismissing the petition, and the petitioner appealed. The case came on to be heard before *Morton, J.*, who reserved it upon the pleadings and agreed facts for the consideration and determination of the full court, such decree to be entered as should seem meet.

By the agreed facts, it appeared, that Nancy Pierce, of Graf-

ton, died on the fifth day of May, 1894, leaving as her heirs at law and next of kin, Charles A. Pierce, a brother, Silas A. Pierce, a brother, George B. Pierce and James W. Bigelow, nephews, Sarah Pierce, Adaline L. Green, Harriet A. Mann and Mary W. Sawyer, nieces, Carrie Baker and Mary E. Bigelow, grandnieces, and Charles F. Bigelow and Frank A. Bigelow, grandnephews. Her will, executed on October 4, 1878, was allowed by the Probate Court for the county of Worcester on May 24, 1895, and the executor therein named, James W. Bigelow, qualified by giving bond which was approved on May 26, 1896. The inventory filed by the executor showed personal estate amounting to \$931.42, and real estate amounting to \$2,300.

The clause of the will on which the petition was founded, and all other material facts, are fully stated in the opinion of the court.

G. M. Woodward, for the petitioner.

R. Hoar, for Nancy M. Pierce, administratrix.

E. H. Vaughan, for other respondents in interest.

MORTON, J. This is an appeal from a decree of the Probate Court dismissing a petition by the appellant as executor of the will of Nancy Pierce to have the amount of the indebtedness of Silas A. Pierce, a legatee under the will of said Nancy, to the estate of said Nancy determined, and to have the same deducted in ascertaining the part to which said Silas would be legally entitled under the will of said Nancy. The case was reserved for the full court on the pleadings and agreed facts, "such decree to be entered as shall seem meet."

The clause in the will under which the question in the case arises is as follows: "First after paying my just debts I do hereby give and bequeath to my legal heirs all my estate of every description with the exclusion of my brother Lewis Pierce's heirs, and it is my will that they shall have no part or parcel of my estate; also that part that would legally belong to my brother Silas A. Pierce I do hereby order to be held in trust by my said executor and the income to be paid by my said trustee to the said Silas A. Pierce yearly, and when in the opinion of my said trustee that the said Silas A. or any of his family need it for their necessary support then my said trustee is at liberty to pay

over the whole or any part of the principal as he may deem best."

The will was executed October 4, 1878, and was allowed May 24, 1895. At the time of her death the testatrix held three notes against Silas amounting on December 3, 1898, with interest to \$792.39. The earliest of these was dated December 21, 1878. It does not appear that Silas was indebted to the testatrix when the will was executed. Silas died intestate September 21, 1899, and Nancy M. Pierce was appointed administratrix. He was about eighty years of age and feeble physically and mentally. His family consisted of a wife and two children, one self supporting and the other an inmate of a lunatic asylum. His wife contributed to the support of the family.

The question is one of construction and is whether the amount due the estate of Nancy from Silas is to be deducted in ascertaining "that part that would legally belong" to him under the will, and the answer depends on what was the intention of the testatrix. The appellant contends that what would legally belong to Silas would be what would remain after his indebtedness to the estate was deducted from what would otherwise come to him. That is, no doubt, a possible construction. But we think that the more natural and reasonable construction is that the testatrix intended what would belong to Silas in the division of the estate, excluding the heirs of Lewis. The part thus coming to him would legally belong to him, and there is nothing to show that when the will was executed, Silas was indebted to her, or that it was expected that he would be. To interpret the word "legally" therefore in the strict and technical sense for which the appellant contends would be unwarranted by anything in the relations of the parties when the will was executed. Moreover such a construction might and probably would defeat the trust which the testatrix was at pains to establish for the benefit of Silas and his family. It seems to us that the construction which we have adopted is the more reasonable one. Pub. Sts. c. 136, §§ 22, 23, do not apply because according to the construction which we have given to the will it was the intention of the testatrix that the indebtedness should not be deducted.

We think that the decree of the Probate Court should be affirmed.

So ordered.

JOHN NEYLON *vs.* ANNIE L. PHILLIPS & another.

Suffolk. March 7, 1901. — June 18, 1901.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

Negligence, In driving, Contributory negligence and due care.

It is no evidence of negligence on the part of the driver of a coal team, backing it towards a pile of coal and knowing the plaintiff to be behind the wagon, that as the team approached the pile of coal the horses backed more quickly and that, from some unexplained cause, the wagon swerved and caught the plaintiff between it and a post and injured him. Horses backing as these were cannot be expected to move at the same rate of speed all the time.

A coal shoveller, about to unload a team which is backing towards a pile of coal, who places himself behind the wagon and walks backwards with his hands on the doors at the end of the wagon, and in so doing is caught between the wagon and a post which he knew was there and could have seen by looking around, has voluntarily assumed the risk of injuries so caused and is not in the exercise of due care.

TORT by a coal trimmer and shoveller in the employ of the Chelsea Gas Light Company to recover for injuries caused by the alleged negligence of a servant of the defendants who were engaged in carting coal for that company from a wharf to its shed. Writ dated October 29, 1898.

At the trial in the Superior Court, before *Sherman, J.*, upon the evidence for the plaintiff which is described in the opinion of the court, the judge directed a verdict for the defendants; and the plaintiff alleged exceptions.

E. N. Hill, for the plaintiff.

S. R. Spring, for the defendants.

MORTON, J. This is an action of tort to recover for personal injuries caused by the alleged negligence of the defendants' servant. The court directed a verdict for the defendants and the case is here on the plaintiff's exceptions. The plaintiff was in the employ of the Chelsea Gas Light Company as a coal trimmer and shoveller. At the time of the accident the defendants were engaged in carting coal for the Gas Light Company from a wharf to its shed. The plaintiff's work consisted in helping to unload the wagons and in shovelling the coal on to the heaps in the shed. There were rows of posts in the shed about fifteen

feet apart, the spaces between which were called "bays." The wagons were six to seven feet in width from hub to hub and carried about four and one half tons each. The tops of the tail-boards were about six feet from the ground. There were doors in the rear end of the wagons which were opened to let out the coal. The drivers would drive into the shed and turn round and back down one of the bays to the coal heap. As they backed down one of the men would step in behind the wagon and walk backwards towards the coal heap so as to be ready to open the doors and let out the coal when the wagon got far enough. They did this so as to save themselves the trouble of shovelling the coal off the floor. On the day of the accident one Tenny a driver for the defendants came to the shed, and drove in, and turned round and began to back down the first "bay." When he got within ten or fifteen feet of the coal pile the plaintiff stepped in behind the wagon and began to open the doors. He kept his hands on them so as to prevent them from opening and letting out the coal and in that position walked backwards towards the coal heap as the wagon continued to back. Shortly before it reached the coal heap the wagon began to back quickly and swerved to the right and caught the plaintiff between it and one of the posts and caused the injuries complained of. The plaintiff could not see the driver and the latter could not see the plaintiff although there was evidence tending to show that he knew that the plaintiff was behind the wagon. The plaintiff could have seen the post by turning his head but he did not, having his attention engrossed as he testified by watching the team and the backing. There was no evidence as to what caused the wagon to swerve.

We think it plain that a verdict was rightly ordered for the defendants, and that it can be sustained either on the ground that the plaintiff was not himself in the exercise of due care or that there was no evidence of negligence on the part of the driver. There is no evidence as to what caused the wagon to swerve. For aught that appears the driver was a competent driver and the horses were safe and steady horses. There is nothing to show that the wagon was out of repair, or that it was an improper vehicle for use in that business and place. The cause of the swerving is entirely a matter of conjecture, as is

also the cause, if that is material, of the quicker backing as the wagon approached the pile of coal. Naturally horses backing as these were could not be expected to move at the same rate of speed all the time, and it is no evidence of negligence on the part of the driver that as the horses approached the pile of coal they backed more quickly, and that, from some unexplained cause, the wagon swerved and struck the post. Something more must appear than has been shown to make out negligence on the part of the driver. Further, it seems to us that the plaintiff was not himself in the exercise of due care. He voluntarily and for his own convenience placed himself behind the wagon and walked backwards with his hands on the doors. The position was one of risk and he voluntarily assumed it. He knew that the driver could not see him, and that his attention was engrossed by his team and the difficulty of backing down between the posts. He knew that the posts were there but he did not look around though he would have seen the post if he had done so. It might well be held, we think, that, under such circumstances, he was not in the exercise of due care. *Casey v. Malden*, 163 Mass. 507.

Exceptions overruled.

POWOW RIVER NATIONAL BANK & others vs. JOHN
E. ABBOTT, administrator, & others.

Suffolk. March 11, 1901. — June 18, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, BARKER,
HAMMOND, & LORING, JJ.

Limitations, Statute of, Relief from special limitation of two years under Pub. Sts. c. 136, § 10. Equity Jurisdiction. Executor.

In a bill in equity under Pub. Sts. c. 136, § 10, seeking to enforce a claim against the estate of a deceased person on which suit had not been brought within two years from the time the administrator gave his bond, an allegation, that through mutual mistake of the administrator and the plaintiff a representation of the estate as insolvent was made so late that it was impossible for the plaintiff to present his claim to the commissioners until after the expiration of the two years, is bad, on special demurrer, for failing to allege with sufficient particularity in what the alleged mutual mistake of the plaintiff and the administrator consisted. A creditor of the estate of a deceased intestate, who has failed to bring suit on his

claim within two years from the time that the administrator of the estate gave bond for the discharge of the trust, is not entitled to relief under Pub. Sts. c. 136, § 10 on the ground that he refrained from bringing suit at the suggestion of the administrator of the estate relying on certain statements made in good faith by the administrator.

BILL IN EQUITY by certain creditors of the estate of Allen S. Weeks, deceased intestate, under Pub. Sts. c. 136, § 10, praying to be allowed to share in the assets of that estate and be given judgments for the amounts of their respective claims against it, they having failed to bring suit upon their claims within two years from the time that the administrator of the estate gave bond for the discharge of his trust, filed August 28, 1900.

The defendants were John E. Abbott, administrator of the estate of Weeks, and four creditors whose claims had been allowed. The defendants, except the administrator, demurred to the bill, among other grounds, for want of equity and because it failed to allege with sufficient particularity in what the alleged mutual mistake of the plaintiffs and the defendant Abbott consisted.

The bill alleged, that Weeks died on August 8, 1897, and on August 19, 1897, the defendant John E. Abbott, an attorney and counsellor at law, was appointed administrator of the estate and on the same day gave bond as such administrator; that the defendant administrator found the estate to be greatly confused, and that there were many questions of fact and law requiring much time for their adjustment and requiring the prosecution and defence by him of sundry suits concerning the title to a part of the assets, and found, during the early part of his administration, that the estate was insolvent and insufficient to pay the claims of creditors in full; that the plaintiffs presented their claims to the defendant administrator after the expiration of one year and before the expiration of two years from his appointment; and that the defendant administrator then informed the plaintiffs that the estate was insolvent, that there were many collateral matters to be adjusted by him, that he was engaged in considerable litigation involving the assets of the estate, and that it was not wise, nor would it be beneficial to the creditors, nor to the estate, to have a multiplicity of suits instituted for the collection of the claims of the plaintiffs, that he intended to represent the

estate insolvent, so that commissioners, to whom the claims of the creditors might be presented, would be duly appointed by the Probate Court, that the rights of the creditors would thus be protected, and that for that reason it would be a waste of the assets to bring suit against the estate; that the defendant administrator intended to represent the estate insolvent, and that notice of the fact should be received by the plaintiffs, giving them ample time in which to present their claims to the commissioners before the expiration of the period limited by the statute, but that, through mutual mistake of the administrator and of the plaintiffs, such representation was made so late that it was impossible for the plaintiffs to present their claims to the commissioners until after the expiration of two years from the time when the administrator filed his official bond; that the plaintiffs, and each of them, relying upon the statements of the defendant administrator, and being desirous not to increase the costs of the estate, and relying upon the insolvency of the estate and upon its due representation as insolvent, and upon the appointment of commissioners in due course by the Probate Court, and notice to them of such appointment, refrained from bringing suit, and had not before the date of the filing of the bill brought action upon their several claims; that on August 17, 1899, the defendant administrator represented the estate insolvent, and on the same day a warrant was issued by the Probate Court appointing the defendants C. P. Weston and F. K. Linscott commissioners; that the warrant did not reach the commissioners until after August 19, 1899, two years from the date when bond was given by the defendant Abbott as administrator, and the commissioners qualified as such on September 21, 1899; that meetings of creditors were held by the commissioners on October 14, 1899, and February 7, 1900, and the claims of the plaintiffs were found to be just claims and correct as to amount, but upon the objection of the defendants Ruggles, Chase, and Thomas, and their attorneys, the claims of the plaintiffs were not allowed; that the commissioners, on July 30, 1900, by permission of the Probate Court, filed their report, stating therein the reason for which they disallowed the plaintiffs' claims, namely, that their claims were barred by the statute of limitations, no suit having been brought on them, nor

presentation made of the claims to the commissioners within two years from the time when bond was given by Abbott as administrator; that the only claims allowed by the commissioners were those of the four respondents, Ruggles, Chase, Emeline Thomas, and Harry Thomas, amounting in the aggregate to \$37,854.26; that the total assets of the estate, without deducting charges and commissions, amounted to about and not exceeding \$15,000; that the claims of the plaintiffs and of those creditors in like position, being twelve in number, amounted to \$82,902.70; that at the time of bringing the bill no order of distribution of the estate of Weeks had been made by the Probate Court and no distribution had in fact been made; that the entire estate would therefore in any event be divided among creditors, and that unless the relief prayed for was granted the whole estate would be divided among the four creditors whose claims aggregated \$37,854.26, to the exclusion of the twelve creditors whose claims aggregated \$82,902.70.

The case came on to be heard on the bill and the demurrers of the defendant creditors before *Lathrop, J.*, who, at the request of the parties, reserved it for the consideration of the full court. If the demurrers were sustained the bill was to be dismissed; otherwise the cause was to stand for further hearing.

The case was argued at the bar in March, 1901, and afterwards was submitted on briefs to all the justices.

S. Lincoln, (*J. T. Choate* with him,) for the plaintiffs. *Wells v. Child*, 12 Allen, 333, was decided long before the court obtained general equity powers, and when its equity jurisdiction was based on many separate grants from the Legislature, which were construed narrowly. Since the granting of general equity powers in 1877, a marked change may be seen in the attitude of the court on equitable questions.

In no case decided before the court obtained full equity powers had a bill under the Pub. Sts. c. 136, § 10, been sustained. Since that time three cases have arisen, and in each case the relief was granted. *Morey v. American Loan & Trust Co.* 149 Mass. 253. *Knight v. Cunningham*, 160 Mass. 580. *Ewing v. King*, 169 Mass. 97.

It is true that none of these cases having in view their facts overrule the case of *Wells v. Child*, the early case cited above,

but they do overrule that case on the proposition that relief under the statute can be had only when there is such fraud, accident or mistake as would be a ground for equitable relief under general equity powers. *Knowlton*, J., speaking for the court in *Ewing v. King*, *supra*, says that the statute is remedial, and expressly states that the operation of the statute is not limited to those cases where the failure to sue seasonably was due to such fraud, accident or mistake as would be a ground for equitable relief if there were no statute. Furthermore, it would seem that something more than general equity powers are required to sustain the case of *Knight v. Cunningham*, *supra*.

That this statute adds something to the general equity powers to relieve against the statute of limitations is settled by the late cases in this court cited above. What, then, does the statute mean? It must mean what it says, and that is that when justice in any particular case requires the setting aside of the statutory bar, the court will do so. It leaves the application of the special statute of limitations discretionary with the court.

G. A. A. Pevey, for the defendants Thomas.

H. K. Brown, for Anna H. Ruggles.

E. B. Gibbs, for Charles Chase.

HAMMOND, J. It is plain that under the adjudications made by this court in cases which have arisen under this statute these plaintiffs are not entitled to the relief which they seek. *Wal-tham Bank v. Wright*, 8 Allen, 121. *Jenney v. Wilcox*, 9 Allen, 245. *Wells v. Child*, 12 Allen, 333. *Sykes v. Meacham*, 103 Mass. 285. They knew of the death of Weeks, and of the appointment of the administrator of his estate. They must be assumed to have known that, whether the estate was declared insolvent or not, their claims would be barred, unless within the statutory period of two years they commenced legal proceedings before the proper tribunal to enforce them, and that the administrator had no power to waive for the estate the benefit of the statute. They knew all the facts respecting their rights. No fraud or accident is alleged; and, while there is a vague allegation of mistake, there is nothing to show the nature of the mistake, and, as against a special demurrer, that the bill fails to allege with sufficient particularity in what the mistake consisted, the allegation must be held to be insufficient.

The delay was not caused by their ignorance of a fact which they did not suspect existed and which they had reasonable ground to believe did not exist, as was the case in *Morey v. American Loan & Trust Co.* 149 Mass. 253, and *Ewing v. King*, 169 Mass. 97, cases upon which the plaintiffs rely but which in this material respect are distinguishable from this. Nor was the delay agreed to by all parties interested in the estate, including heirs and creditors, as in *Knight v. Cunningham*, 160 Mass. 580. The plain, simple case shown by the bill is that the plaintiffs, knowing fully their rights and the time within which they must assert them by legal proceedings, relied upon certain statements of the administrator, about whose good faith, however, we do not understand any question is made, and allowed the time to go by until it was too late.

The case must stand in the same class with those named in the first paragraph of this opinion. The demurrer must be sustained.

Bill dismissed.

Justices KNOWLTON, MORTON and BARKER dissent from this opinion.

ANNA C. KIANDER vs. BROOKLINE GAS LIGHT COMPANY.

Suffolk. March 12, 1901. — June 18, 1901.

Present: HOLMES, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Negligence, Contributory negligence and due care.

A tenant in a building having a right to use a water closet in the basement, who goes into the closet in the dark without a light and bumps his head against a protruding gas pipe which has been in the same place during the whole of the two months that he has occupied his premises, is not in the exercise of due care and cannot recover for an injury thus incurred.

TORT to recover for personal injuries caused by the plaintiff striking her head against a gas pipe alleged to have been placed wrongfully and negligently by the defendant across a portion of the doorway of a water closet in the basement of No. 19 Union Park Street, which the plaintiff as a tenant of that building had a right to use. Writ dated December 11, 1895.

At the trial in the Superior Court, before *Hopkins, J.*, without a jury, it appeared, that the plaintiff carried on a store and bakery on the first floor of the building named; that she went to her store at four A. M. on December 2, 1895, and between six and seven o'clock had occasion to go to the water closet in the basement; that she went down a staircase leading from her store to the basement; that it was dark, and before opening the door which led to the stairs she scratched a match, with which she lit a gas light half way down the stairs; that the stairway was a crooked one; that as she came down stairs the opening to the water closet was on her left; that she stepped from the bottom step into the basement, turned to the left and walked a step or two, so that she faced into the water closet; that she stepped up with her right foot, that "you had to kind of stoop," and that something struck her on the right side of the head.

On cross-examination, the plaintiff testified that it was dark in the basement even with the gas lighted on the stairs, and that she did not light any matches as she went into the closet.

It further appeared, that there was a pipe of the defendant at the place described by the plaintiff in the front part of the water closet, that this pipe had been put in in April of 1894, and that the plaintiff was a tenant at will of the store and bakery which she had occupied since about the first of October, 1895; that the water closet was the only one in the building and was not let with the plaintiff's premises but that she had the right of using it.

At the close of the evidence, the plaintiff requested the judge to rule that as a matter of law she could recover, and asked the judge to find for the plaintiff. The judge refused so to rule, and found for the defendant; and the plaintiff alleged exceptions.

E. R. Anderson, for the plaintiff.

W. I. Badger & E. K. Woodworth, for the defendant.

LORING, J. The judge was warranted in finding that the plaintiff was guilty of contributory negligence. She had been using the closet for two months and one day, and must have been familiar with the gas pipe in question. Yet she went into the closet between six and seven o'clock in the morning of December 2, without a light, and bumped her head against the pipe.

Exceptions overruled.

J. WINTHROP SIAS vs. LOWELL, LAWRENCE AND HAVERHILL STREET RAILWAY COMPANY & another.

Middlesex. March 13, 1901. — June 18, 1901.

Present: HOLMES, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Negligence, Towards employee of another using poles in common.

A street railway company owning and maintaining poles supporting wires that hold and protect its trolley wires, which has granted to a telephone company for a consideration the right to use its poles for the purpose of supporting telephone wires, is not liable for negligence to an employee of the telephone company who falls by reason of an electric shock received by him while attempting to tighten a slack span wire of the railway company. The highest duty owed by the railway company to a person thus at work upon its wires without its permission, is not wilfully or wantonly to injure him.

TORT to recover for injuries from a fall caused by the plaintiff, an employee of the Peoples Telephone Company, receiving an electric shock while lawfully on a pole owned and maintained by the defendant the Haverhill and Amesbury Street Railway Company, the electric power being furnished by the defendant the Lowell, Lawrence and Haverhill Street Railway Company. Writ dated August 31, 1899.

At the trial in the Superior Court, before *Gaskill, J.*, it appeared, that the pole in question was one of a series of poles belonging to the defendant the Haverhill and Amesbury Street Railway Company, which owned and operated an electric street railway line running from Washington Square in Haverhill through Emerson and White Streets to Charles Street toward Amesbury, and which controlled the continuous system of guard and span wires over its trolley wire for the support and protection of the latter; but the electric power used for propelling the cars was furnished to it by the defendant the Lowell, Lawrence and Haverhill Street Railway Company under a contract.

It further appeared, that these poles were used by the Peoples Telephone Company under a written agreement, dated October 27, 1897, which, omitting the introductory and attesting paragraphs, was as follows: "That the said Haverhill & Ames-

bury Street Railway Co. hereby agrees to allow said Peoples Telephone Co. the right to use its poles for the purpose of conveying wires and cables from Washington Square to Kaulbacks. Said Telephone Company agrees to pay said Railway Company the sum of \$.25 per pole annually for the use of said poles. The said Peoples Telephone Company also agrees to furnish said Haverhill & Amesbury St. Railway Co. one telephone at \$24. per year. The rental in both instances to be payable annually on the first day of January, and to put in a telephone at Kaulbacks and at Holden's Drug Store for the use of said Railway Co. And it is further agreed that the Peoples Telephone Co. will assume all risks as to any damages which might arise from or to their employees while working on the poles of said Railway Company."

The plaintiff objected to the admissibility of the part of the agreement in the last sentence printed above. The judge admitted it, and the plaintiff excepted. The decision of the court has made this exception immaterial.

Evidence was introduced of which the substance is stated in the opinion of the court. At the conclusion of the evidence, the judge ruled that the plaintiff could not recover and ordered a verdict for the defendants. The verdict was returned as directed; and the plaintiff alleged exceptions.

W. H. Baker, (*E. Lowe* with him,) for the plaintiff.

J. P. Sweeney, for the Lowell, Lawrence and Haverhill Street Railway Company.

W. I. Badger, for the Haverhill and Amesbury Street Railway Company.

HAMMOND, J. Without considering the question whether the plaintiff was in the exercise of due care, we think a verdict for the defendants was rightly ordered.

The pole from which the plaintiff fell was one of a series of poles extending through Emerson and White Streets in Haverhill, and owned by the Haverhill and Amesbury Street Railway Company. By the writing of October, 1897, this company granted to the Peoples Telephone Company the right to use these poles among others, "for the purpose of conveying wires and cables," the telephone company paying a certain consideration therefor and agreeing to "assume all risks as to any dam-

ages which might arise from or to their employees while working on the poles."

Upon these poles, at the time of the accident, were two sets of wires, one owned and used by the street railway company and one by the telephone company. The night before the accident a telephone in a house near White Street had burned out. Bunce, a foreman of the telephone company, investigated, and located the "leakage" of electricity as being at the iron pole next to the wooden pole from which the plaintiff fell. He found that the insulation of a telephone wire attached to the iron pole was burned off, and the wire was lying across one of the railway company's guard wires supporting the guard wire running over the trolley. This showed that the guard wire in some way and at some time had become charged, and that there had been "a leakage" of electricity into it, and from it into the telephone wire.

The next morning Bunce, with the plaintiff, both being servants of the telephone company, started out "to clear the trouble." He testified that the guard wire over and parallel with the trolley wire had sagged, so that there was danger that the trolley wire might be pushed against it by the trolley of a passing car, and he thought that the "leakage" into the guard wire over which he saw the damaged telephone wire lying might have been caused in that way. This sagging was caused in part by the slackness of the span wire by which it was connected with the poles, and Bunce with the plaintiff began to "pull the slack out of the" span wire. After fixing the span connected with the iron pole, they proceeded to the wooden pole. The plaintiff, upon being asked whether he or Bunce should go up the pole, said he would go. He mounted the pole for the purpose of tightening the span wire. He released the span wire from the insulator near the pole, put a strap in which there was a small vise around the pole, then tightened the wire which he held, by means of the vise and strap, and while in the act of attaching the wire to the insulator received a shock and fell.

It is thus seen that the plaintiff was injured while at work upon a wire of the railway company. It does not appear that this was at the request or solicitation of the railway company. It is true that there is evidence tending to show that so far as

respected the rake or cant of the poles there was an understanding between the two companies that the telephone company would put them in proper shape, but nothing appears as to the wires. It does not appear that the telephone company was expected to repair or meddle with the wires of the railway company except perhaps to keep the poles at the proper rake, or that the latter solicited or allowed the former to interfere with its wires. The plaintiff at the time of his injury was at work not upon a telephone wire but upon a wire of the railway company, without its permission express or implied. While the plaintiff was thus at work the highest duty the railway company owed to him was that of not wilfully or wantonly injuring him.

There is still less reason for holding the Lowell, Lawrence and Haverhill Street Railway Company answerable. It owned neither pole nor wires. It is true that it supplied the power, and there was evidence tending to show that there was imperfect insulation of its wires, but this was at a point several hundred feet away from the place of the accident, and the evidence failed to show that the injury to the plaintiff was in any way attributable to that condition of its wires, but it tended to show the contrary, inasmuch as the contact which charged the wire, and of which the plaintiff complained, was caused by the sagging of the wire which was above the trolley wire, to such an extent as to touch the trolley wire when pushed against it by the trolley of a passing car.

Exceptions overruled.

THOMAS J. SCOLLANS vs. E. H. ROLLINS AND SONS.

SAME vs. SAME.

Suffolk. March 19, 1901. — June 18, 1901.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

Conversion, Of non-negotiable security indorsed in blank. Bailment. Evidence, Relevancy. Damages, Interest.

If the owner of a registered city bond transferable only at the office of the city treasurer, having upon its back an assignment in blank executed and acknowl-

edged by its former owner, intrusts it to another for safe keeping, in a city where a usage exists to treat such bonds thus indorsed and acknowledged as the property of the bearer, and the person to whom it is so intrusted embezzles the bond and pledges it for his own debt, whereby it passes into the hands of a *bona fide* purchaser for value, *semble*, that the person thus intrusting the bond to another cannot recover its value from the *bona fide* purchaser.

The owner of a registered city bond transferable only at the office of the city treasurer, having upon its back an assignment in blank executed and acknowledged by its former owner, handed it to a stock broker, whom he was employing in buying and selling stocks, saying that he should like to leave it with him for safe keeping. The broker went with the bond into the next room where the safe was, and returned in a short time with a large envelope upon which were written the name of the owner of the bond and the words "Private Property." The broker then put the bond into the envelope and also at the owner's request put in an insurance policy, sealed the envelope in the owner's presence and carried it into the vault. Later the broker dishonestly pledged the bond for his own debt, and it came into the hands of a *bona fide* purchaser for value. *Held*, that there was no evidence of an intrusting of the bond to the broker, but that the transaction resulted in a bailment of a sealed envelope, the broker having no right to open the envelope after he had sealed it in the owner's presence and with his consent; therefore, that the owner was not estopped from asserting his title against the *bona fide* purchaser for value. HOLMES, C. J., not concurring on this point, although delivering the opinion of the court.

In an action for the conversion of a bond, the defendant introduced evidence for the purpose of showing that the bond was pledged as security by the plaintiff to certain brokers under whom the defendant claimed, and that the plaintiff's account with the brokers at that time was short. The plaintiff testified, that at no time had he been indebted to the brokers and that on one or two occasions during the period in question he lent the brokers money which was repaid by their checks. The plaintiff against the defendant's objection was allowed to put in evidence five checks from the brokers to him dated during the period in question. *Held*, that the checks tended as far as they went to corroborate the plaintiff's case and were admissible as against a merely general objection.

A plaintiff recovering judgment for the conversion of a four per cent bond is entitled to interest at the rate of six per cent per annum from the date of the writ.

TWO ACTIONS OF TORT originally brought in the Municipal Court of the city of Boston, each for the alleged conversion of a registered certificate of the city of Boston for the sum of \$1,000 with an assignment on the back signed in blank by one William Scollans, the defendant, E. H. Rollins and Sons, being a corporation. Writs dated December 29, 1896.

The cases coming by appeal to the Superior Court, were tried before *Maynard, J.*, who directed verdicts for the defendant, and allowed a bill of exceptions. The exceptions were sustained in a decision of this court reported in 173 Mass. 275.

At the new trial in the Superior Court, before *Stevens, J.*, in addition to the facts which appeared at the former trial, the de-

fendant introduced evidence tending to show, that there was a settled usage or custom in the city of Boston, at the time of the transaction in question, among those dealing in certificates like those in the case at bar, to pass title to the same by delivery of the certificates with the assignment on the back executed and acknowledged by the person named in the certificate, but with the space for the transferee's name left blank, and to regard certificates so indorsed as assigned to bearer, and also that by this usage and custom certificates so indorsed passed from hand to hand without inquiry as to the title of intermediate holders.

The blank assignments executed by William Scollans on the certificates in the case at bar were executed by him and acknowledged before a justice of the peace as required by Pub. Sts. c. 77, § 6, and by the usage above stated.

The testimony of the plaintiff in regard to his delivery of the bonds, which was held by the court not to be an intrusting, was as follows: That on or about August 13, 1896, the plaintiff received from his father, William Scollans, the two bonds in question, and that his father gave them to him in settlement of a debt he owed him; that at first, after receiving the bonds, he went with his father to the office of Mr. Francis Burke, a lawyer, where his father acknowledged his signature to the assignments, and that the plaintiff then brought the bonds back and placed them in his desk; that several days after this he spoke about these bonds to one Gage, of the firm of Gage and Felton, employed by the plaintiff as brokers, saying that he should like to leave the bonds in the firm's safe for safe-keeping until he should want to use them; that Gage consented and asked for the bonds, and he, Scollans, handed them to him, and Gage went into the next room where the safe was, and returned in a short time with a large envelope upon which was written his, Scollans', name and the words "Private Property"; that Gage then placed the bonds in the envelope and was about to seal it, when he, Scollans, handed him an insurance policy and asked him to place that also in the envelope. That Gage did this, and the envelope was then sealed in Scollans' presence, and Gage carried it into the vault in which the safe was. The plaintiff testified that he knew Gage's reputation to be of the best and believed his character to be beyond question and that the per-

sonal relations between Gage and himself were those of very close friendship.

The plaintiff's counsel offered in evidence five checks drawn upon the Globe National Bank, made by Gage and Felton in August, 1896, payable to the order of the plaintiff, of the following dates and amounts: August 11, \$1,500; August 13, \$1,000; August 21, \$412.50; August 21, \$1,000; August 20, \$775. No reference had been made to these checks by the plaintiff in his deposition, unless his testimony that he had made loans to Gage and Felton, which had been repaid by their checks, was such a reference, nor had he been asked in regard to them, nor was any witness asked with regard to them, nor were they referred to in any way in any of the accounts put in evidence. The signatures were genuine, and it appeared that they had gone in regular course through the clearing house, and it was agreed that they were obtained by the plaintiff's counsel from the assignee in insolvency of the firm of Gage and Felton. The defendant objected to the admission of these checks, but its objection was overruled and the checks admitted, and marked as exhibits, and the defendant excepted.

The plaintiff had testified that at this time the firm of Gage and Felton owed him several thousand dollars; that this indebtedness arose from their buying and selling stocks for him, and that the balance was always in his favor. He further testified that when Gage went into the firm of Gage and Felton he, Scollans, lent him \$5,000, for which he held Gage's note, which was never paid. He testified that at no time had he become indebted to the firm of Gage and Felton.

In response to a cross-interrogatory, the plaintiff deposed: "On one or two occasions I made loans to the firm of Gage and Felton, I think between August 1 and November 1, 1896. I gave them my check for the various sums loaned, and they repaid me by their checks."

Gage had testified, for the defendant, that there was no time in August, 1896, when the plaintiff's account with Gage and Felton was not behind three or four thousand dollars, and that the plaintiff gave them the two registered city of Boston certificates, registered in the name of William Scollans, and stated that they were to be used for margin on his account.

Gage and Felton pledged the certificates for their own debt, and they came to the defendant as a *bona fide* purchaser for value in the usual course of business, as stated in the opinion of the court.

The plaintiff offered no evidence to contradict the defendant's witnesses as to the existence of the usage stated above. The defendant thereupon asked the judge to rule, in both cases, that upon all the evidence the plaintiff could not recover and to order a verdict in each case for the defendant. The judge refused to rule as requested, and the defendant excepted. The defendant asked for various rulings as to the effect of the usage if found to exist, and as to the negligence of the plaintiff in intrusting the certificates to Gage, and also asked for a ruling that, if the jury found for the plaintiff, the measure of damages was the market value of the securities at the time of the alleged conversion and interest from that time at the rate of four per cent per annum.

The judge refused to give any of the rulings requested, and in his charge to the jury among other things instructed them as follows: "I instruct you, gentlemen, for the purposes of this case, that this was not a negotiable security, and the same rule of law applies to what we call personal property; that is, the title once being in Thomas J. Scollans, as it is admitted, in August, 1896, that title still remained in him, unless he did something himself to divest himself of that title.

"There has been considerable evidence about what the custom was, and perhaps I ought to say to you, gentlemen, that most of that evidence will be excluded. There was some claim that the plaintiff was negligent in having placed those certificates where it was possible for Gage and Felton to use them, and pass them over to somebody else, and that being guilty of such neglect, he would be estopped in setting up title to them if they afterwards got into the possession of any third party who was in the exercise of reasonable care and prudence when he took possession of the securities; and it was for that object that all that evidence was introduced — for the purpose of showing that the defendant was not guilty of negligence when it took these securities after they were sold to it by R. L. Day and Company, without having made any inquiry as to who the owner of them

was, but that evidence may be all excluded, because it is of no consequence; and I instruct you, that the plaintiff was not guilty of any negligence in doing what he did in relation to those certificates; so that the only question for you to consider is, whether or not those certificates were delivered by the plaintiff to Gage and Felton as collateral security, or whether they were simply placed in their safe for safe-keeping. That is the simple issue. The issue is a single one for you to pass upon, that is to say, whether or not the story of Gage is the one which you will adopt, or whether you will adopt the story of the plaintiff in what he says he did with those certificates."

The judge then proceeded to charge the jury, that, if they believed the plaintiff's story and found that the bonds had been given to Gage and Felton or to Gage for safe-keeping, they must find for the plaintiff in both cases; and, if they found that the bonds were given to Gage and Felton or to Gage as collateral security for the plaintiff's account, they must find for the defendant in both cases.

The judge further instructed the jury, that if they found for the plaintiff they should return a verdict in each case in the sum of \$1,076.25, the admitted value of the bond at the time of the alleged conversion, with interest at the rate of six per cent per annum from the date of the writ.

The jury found for the plaintiff in both cases; and the defendant alleged exceptions.

A. Hemenway & R. F. Sturgis, for the defendant.

J. E. Hannigan, (*W. Wilson* with him,) for the plaintiff.

HOLMES, C. J. These are actions for the conversion of two certificates of indebtedness of the city of Boston, payable to William Scollans, and transferable only at the office of the city treasurer. On the back of each was an assignment in blank, executed and acknowledged by William Scollans, (see Pub. Sts. c. 77, § 6,) by virtue of which, coupled with a delivery of the instruments, the plaintiff became the owner. On the most favorable evidence for the plaintiff, as we must take the case, the plaintiff went to one Gage of the firm of Gage and Felton, bankers and brokers, and said that he would like to leave the certificates in the firm's safe-keeping. Gage consented and asked for the certificates, and the plaintiff handed them to him.

Gage went into the next room where the safe was, and returned in a short time with a large envelope, upon which was written the plaintiff's name and the words "Private Property." Gage then put the certificates into the envelope, sealed it, and carried it into the safe. Later the certificates were pledged by Gage and Felton for their debt, and were sold at auction in due course by the pledgee, and bought in the usual course and in good faith by the defendant. The case already has been before the court. 173 Mass. 275. The difference between its present aspect and that upon which the court has passed is that at this trial evidence was offered, in accordance with an intimation in 173 Mass. 279, of the usage of those engaged in the business of buying and selling such securities, which was intended to show that by their general understanding and practice such an indorsement in blank enabled the bearer to give a good title to a *bona fide* purchaser. The court ruled, however, that the only question for the jury to consider was another issue, which now is immaterial, as the jury found for the plaintiff upon it, and the defendant excepted.

A blank indorsement of such an instrument signifies that some person is expected to have the right to fill in the blank. On its face it does not indicate who that person is. By itself it is ambiguous. If, however, the general understanding of all concerned gives it a certain meaning, then it has that meaning by the same convention that gives a certain meaning to spoken or written words. The combination of words and blank is a sign as truly as a completed sentence,—a sign which conveys an idea as definitely as if the word "bearer" had been written in. The extent to which the owner shall be estopped by permitting the sign to remain upon the instrument in that form may be enlarged or limited by considerations of policy more or less articulate. No doubt, if such an instrument were stolen from the owner and indorser before his indorsement had become effective by a transfer or before the instrument had been put into other hands, even a *bona fide* purchaser would not get a title, and a different rule would be applied from that which is established in the interest of the currency with regard to bank notes used as money, and which might be extended to other bills and notes which are negotiable in the true sense. *Knox*

v. *Eden Musee Americain Co.* 148 N. Y. 441. 1 Morawetz, Corp. (2d ed.) § 190. See *Wyer v. Dorchester & Milton Bank*, 11 Cush. 51; *Worcester County Bank v. Dorchester & Milton Bank*, 10 Cush. 488; *Wheeler v. Guild*, 20 Pick. 545, 553; *Spooner v. Holmes*, 102 Mass. 503, 508. But if the owner of the instrument intrusts it to another, he does so charged with notice of the power to deceive which he is putting into that other's hands, and if deception follows he must bear the burden. *Colonial Bank v. Cady*, 15 App. Cas. 267, 278, 285, 286. *Jarvis v. Rogers*, 13 Mass. 105; *S. C.* 15 Mass. 389. *McNeil v. Tenth National Bank*, 46 N. Y. 325. *Burton's appeal*, 93 Penn. St. 214. *Pennsylvania Railroad's appeal*, 86 Penn. St. 80. *Mount Holly, Lumberton, & Medford Turnpike Co. v. Ferree*, 2 C. E. Green, 117. *National Safe Deposit, Savings & Trust Co. v. Gray*, 12 App. D. C. 276, 287. 1 Morawetz, Corp. (2d ed.) §§ 185-192. See *White v. Duggan*, 140 Mass. 18, 20; *Union Credit Bank v. Mersey Docks & Harbour Board*, [1899] 2 Q. B. 205; *Pence v. Arbuckle*, 22 Minn. 417. In this case, as in some others, it cannot be said that the owner is free from all obligation to contemplate the possibility of wrong-doing by a third person. See *Glynn v. Central Railroad*, 175 Mass. 510, 511.

There is nothing in the judgment delivered in *Shaw v. Spencer*, 100 Mass. 382, contrary to what we have said. The customary understanding as to the significance of an indorsement in blank could not relieve the taker from notice of a trust expressed on the face of the document, and of the consequence that the trustee had no power to pledge the instrument for his private debt. So very possibly in the case of an indorsement by the executor of a registered holder. *Colonial Bank v. Cady*, 15 App. Cas. 267. But see *Wood's appeal*, 92 Penn. St. 379. Or by a guardian. *O'Herron v. Gray*, 168 Mass. 573. Perhaps it may be as well to add that the usage supposed does not create a new class of negotiable instruments or attempt to enlarge the city of Boston's promise, as was attempted in *Partridge v. Bank of England*, 9 Q. B. 396. It simply fixes the meaning of an ambiguous expression, for the purpose of determining whether it is open to the former owner to deny that the property in the paper and the equitable benefit of the promise have passed to another.

It follows from what we have said that if there was evidence

in this case that the plaintiff intrusted the instruments to Gage, and if there was evidence from which the jury would have been warranted in finding the supposed usage proved, the case should have been left to them upon those issues also, and the defendant's exceptions must be sustained.

There was evidence of the alleged usage. Witnesses testified that certificates indorsed as these were "would be regarded as bearer's certificate passing by delivery from hand to hand"; that they "would be regarded as bearer's property the same as a coupon bond"; that they "were considered negotiable." It is true that on cross-examination the witnesses admitted that if an unknown person came in with such instruments for sale they should take some measures to find out that they were dealing with a responsible man, but, apart from the fact that it always is for the jury to decide how far an absolute statement on direct examination shall be cut down by any qualification or contradiction elicited by the other side, *Purple v. Greenfield*, 138 Mass. 1, 7, the jury would have been warranted in regarding these admissions as simply expressing the natural caution of respectable business men who wished to avoid the possibility of question or of having anything to do with a questionable affair. See *Danvers Bank v. Salem Bank*, 151 Mass. 280, 284; *Hinckley v. Union Pacific Railroad*, 129 Mass. 52, 58, citing *Miller v. Race*, 1 Burr. 452; also 2 Thomp. Corp. § 2589.

But my brethren are of opinion that there was no evidence that the instruments were intrusted to Gage. It may be assumed that a delivery of possession for custody is a sufficient intrusting. See *Hatfield v. Phillips*, 12 Cl. & Fin. 343, 360; *S. C.* 14 M. & W. 665, 670. On the other hand if the certificates had been handed to him in a sealed envelope, they would not have been intrusted to him, and opening the envelope would have been like a carrier's breaking bulk. The modern decisions have followed the ancient suggestion that in such cases there is no delivery of the contents of the enclosure. Choke in Y. B. 13 Ed. IV. 9, pl. 5. 3 Inst. 107. 1 Hale P. C. 504, 505. *Belknap v. National Bank of North America*, 100 Mass. 376, 381. My brethren consider that the bailment to Gage in the form which it finally took was a bailment of the envelope under seal. In their opinion the transaction cannot be divided, and it does

not matter in what form it began. It was not complete until the plaintiff saw the envelope sealed, after having asked Gage to put an insurance policy into the envelope with the bonds, thus showing that he contemplated and assented to the sealing up which he saw was about to take place. They think it plain that after the plaintiff had seen the envelope sealed and placed in the safe and had departed Gage would not have been at liberty to open the envelope, if, for instance, he found it more convenient for safe-keeping to put the bonds away unenclosed. I have not been able to bring my mind to think that the jury were not at liberty to take a different view, but upon that point I stand alone.

An exception was taken to the admission of the checks made by Gage and Felton payable to the order of Scollans. By way of contradicting the defendant's evidence that the plaintiff's account with Gage and Felton was short and that these instruments were delivered to him as security, the plaintiff testified that he lent them money on one or two occasions, which was repaid by their checks. These checks were dated in August, a month when by the defendant's evidence the plaintiff was heavily indebted to Gage and Felton. They tended as far as they went to corroborate the plaintiff's case, and were admissible as against a merely general objection.

We see no reason for not allowing the ordinary rate of interest after the plaintiff acquired a claim for money against the defendant.

Exceptions overruled.

JAMES T. BIGGIO & another vs. CITY OF BOSTON.

Suffolk. March 21, 1901. — June 18, 1901.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

Municipal Corporations, Liability for negligence. Boston, Effect of violation of building laws.

The fact that a plaintiff has constructed his cellar in Boston below the grade required by St. 1892, c. 419, § 31, does not prevent his recovering damages from the city for injuries caused by the city negligently having stopped the outlet of an arm of the sea, so that the water overflowed its banks, crossed the street on which the plaintiff's house stood and poured into his cellar, if the plaintiff's violation of the law did not contribute to the injury. *Semble*, otherwise, if the injury was caused by percolation, as in that case the putting of the bottom of the cellar below the established grade must have contributed to the injury.

TORT against the city of Boston to recover damages for injury to the plaintiffs' house and property alleged to have been caused by water overflowing into the plaintiffs' cellar on account of the defendant stopping the outlet of Orient Lake, so called, in that part of Boston called East Boston. Writ, in the Municipal Court of the city of Boston, dated March 12, 1900.

On appeal to the Superior Court, the case was tried before *Gaskill, J.*, who directed the jury to return a verdict for the defendant, and reported the case for the consideration and determination of this court.

The report was as follows: The plaintiffs were the owners of the premises No. 9 Chelsea Avenue in that part of Boston called East Boston and situated on the side of the hill called Orient Heights. In the vicinity of the plaintiffs' house and on the opposite side of Chelsea Avenue was a body of water commonly known as Orient Lake, in which the tide ebbed and flowed with reasonable freedom, as it was connected with the sea by a waterway or channel, through which the waters from the lake flowed to the ocean passing under three streets by means of tunnels, but the tide in the lake never rose or fell so far as that of the open sea.

The house on the premises was built by the plaintiffs in the year 1896. Sometime before February 22, 1899, the defendant, in order to do some repairs at the bridge over the so-called tun-

nel, at Bennington Street, one of the streets crossing the strait between Orient Lake and the sea, by its operations stopped the flow of the water through the tunnel under Bennington Street until about March 20.

On February 22, February 25, March 2, and March 10, 1899, the water in Orient Lake overflowed its banks, crossed Chelsea Avenue, and flooded the plaintiffs' premises by entering their cellar.

Notice of the overflow of the lake and the flooding of the plaintiffs' cellar was given to the defendant, and on February 28 or March 1, 1899, the defendant by its servants or agents visited the place where the overflow occurred and took the height of the water in the lake and the grade of the plaintiffs' cellar, but did not remove its barriers across the channel or waterway or do anything to prevent the lake from overflowing its banks thereafter.

St. 1892, c. 419, § 31, provides that in Boston "no cellar or basement floor of any building shall be constructed below the grade of twelve feet above mean low water."

The evidence showed, without contradiction, that the grade of the plaintiffs' cellar was only nine and five tenths feet above mean low water, instead of twelve as required by the statute.

The first named plaintiff testified, that he had lived in the vicinity for twenty years and was familiar with the geography of that portion of the city and the action of the water in Orient Lake and the extent of its rise and fall, and that previously to February 22, 1899, it had not overflowed its banks, to his knowledge, nor had he ever been troubled by water flowing upon his land.

The plaintiff further testified, that when he built his house the land about him was laid out in streets and lots; that there were four other houses already built in the immediate vicinity of his lot, two of which adjoined it; that he obtained a permit from the city of Boston in the ordinary form to build upon this location, requiring among other things that the building should conform to law, and that he did not know, by intimation or otherwise, the grade of the cellar in his building, and did not learn of it until the bringing of this suit.

The plaintiff further testified as follows: "Q. Now, Mr.

Biggio, what is the situation of this pond with your house with reference to the ability of anybody to see that the water would flow on to your premises if this pond was overrun? Describe the situation. A. The situation — you mean if the flow overrun? Well, if the water raised right over the land, you mean, and over the street? — Q. Yes. A. Well, it would come right into my cellar. Of course we have what we call kitchen and dining room basement. — Q. Would that be evident to any one examining the place? A. Oh, any one could examine it; yes, sir."

The plaintiffs requested the following rulings: First. That the fact that the cellar of the plaintiffs' house was below the grade prescribed by law was not negligence *per se*. Second. That if the negligence of the defendant, in causing the water to flow over and upon the plaintiffs' premises, was the proximate cause of the injury to the premises, the plaintiff might recover. Third. That the flowage of water over and upon the plaintiffs' premises was the proximate cause of the injury. Fourth. That the plaintiff might recover, although his negligence first exposed him to the risk of injury, if such injury was caused by the defendant's negligent act committed after it had become aware of the plaintiffs' danger.

The judge refused to give these rulings, and directed the jury to return a verdict for the defendant as stated above.

G. H. Russ, for the plaintiffs.

A. L. Spring, for the defendant.

MORTON, J. The defendant contends that the water flooded the plaintiffs' cellar because the cellar was below the established grade, and that the plaintiffs cannot recover because their violation of the statute has contributed directly to the injury which they have sustained. If the report means that the water flowed into the plaintiffs' cellar by percolation through the intervening soil, then, notwithstanding the fact that the water had not flowed into the cellar previously, and would not have flowed into it at the times complained of, but for the stopping of the outlet from the lake by the defendant, we do not see how it can be said that the plaintiffs' act in building the cellar below the established grade did not contribute to the injury which they have sustained. But we doubt whether the report should be so

construed. There is a statement in the report that "the water in Orient Lake overflowed its banks, crossed Chelsea Avenue, and flooded the plaintiffs' premises by entering their cellar." Again, in answer to a question by his counsel, "Describe the situation," the plaintiff testified, "The situation — you mean if the flow overrun? Well, if the water raised right over the land, you mean, and over the street? . . . Well, it would come right into my cellar." What we have quoted tends to show that the water flowed over the street into the plaintiffs' cellar. The plaintiffs' testimony that "he had lived in the vicinity for twenty years . . . and that previously to February 22, 1899, [one of the occasions complained of,] it had not overflowed its banks to his knowledge, nor had he ever been troubled by water flowing on his land," also tends in the same direction. There was no evidence, so far as appears from the report, how high the water rose at the times complained of or how high above mean low water mark Chelsea Street was; but presumably it was higher than the grade fixed for cellar or basement floors. If the water in the lake overflowed Chelsea Street and flowed into the plaintiffs' cellar in that way, it is difficult to see how the fact that the bottom of the cellar was below the established grade contributed to the injury. It at least would be a question for the jury whether it did or not. The mere fact that the plaintiffs may have built their cellar below the established grade would not prevent them in such a case from recovering if their violation of the law did not contribute to the injury which they have sustained. *Newcomb v. Boston Protective Department*, 146 Mass. 596. The operation of natural laws is such that if the water got into the plaintiffs' cellar by percolation, the putting of the bottom of the cellar below the established grade must have contributed to the injury complained of, and therefore as matter of law the plaintiffs would not be entitled to recover notwithstanding the presence of the percolating water may have been due to negligence on the part of the defendant in stopping the outlet of Orient Lake. But if, as already observed, the water crossed Chelsea Street and flooded the plaintiffs' premises by entering their cellar in that way it cannot be said as matter of law that the plaintiffs' act in putting the bottom of their cellar below the established grade contributed to the injury.

New trial granted.

ISAIAH H. WILEY vs. JOHN W. CONNELLY.

Bristol. April 3, 1901. — June 18, 1901.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

Mechanic's Lien, Assignable, When created, How discharged. *Assignment*. *Contract*, Common counts.

A mechanic's lien, under Pub. Sts. c. 191, is assignable and passes with an assignment of the debt which it secures.

A mechanic's lien under Pub. Sts. c. 191, is created as soon as the labor is performed. The filing of the certificate required by § 6 is not necessary to create the lien. It merely keeps it alive and prevents its dissolution.

M., having a mechanic's lien upon certain real estate of Y. and no claim against Y. other than the debt secured by the lien, executed an assignment to the plaintiff of all his claims against Y. and all his interest in any suits to enforce such demands. Later M. made a general assignment to the defendant for the benefit of creditors, informing the defendant of his assignment to the plaintiff. Thereafter Y. paid the amount of the debt secured by the lien to the defendant, and the plaintiff sued the defendant for money had and received. *Held*, that the payment by Y. to the defendant discharged the lien, that the defendant received the money with notice of the plaintiff's claim, and that under St. 1897, c. 402, the plaintiff could recover the amount in an action in his own name for money had and received.

CONTRACT for \$57.79 had and received by the defendant to the plaintiff's use, paid in discharge of a mechanic's lien upon certain real estate of one Yates, the lien being the property of the plaintiff by assignment from one McKenna. Writ, in the Second District Court of Bristol in the city of Fall River, dated December 15, 1899.

The case, coming by appeal to the Superior Court, was there heard upon an agreed statement of facts by *Pierce, J.*, without a jury.

The agreed facts were as follows: That on November 14, 1898, one McKenna had a valid claim of mechanic's lien upon the realty of one Yates, and had no other claim against Yates; that for a valuable consideration on November 14, 1898, McKenna executed and delivered to the plaintiff the following instrument:

"For and in consideration of one dollar and other considerations I hereby assign, transfer and set over to I. H. Wiley of

Boston, Massachusetts, all my claims and demands of whatsoever name or nature against Thomas Chesworth and against Samuel Yates, both of said Fall River, together with all my interest in and to any and all suits and actions now pending to enforce said demands. And I hereby appoint said Wiley my attorney irrevocable in the premises, generally to say and to do all that I might or could if personally present. In witness whereof, I have hereto set my hand and seal, this fourteenth day of November, 1898. Frank T. McKenna. (L. s.) Witness, Charles E. Read, Jr."

That the Yates named in the foregoing instrument was the same Yates against whose realty McKenna had his lien; that on November 16, 1898, McKenna made an assignment to the defendant for the benefit of his creditors; that on November 15, 1898, a statement of the lien was executed by McKenna, and on November 16, 1898, was filed in the proper registry of deeds.

The statement was as follows: "I hereby certify that the following is a just and true account, with all just credits given, of the amount due me for labor performed and furnished in the painting during erection of a building situated on a lot of land in Fall River in said Commonwealth, which lot is described as follows: [Description] said lot of land being owned, to the best of my knowledge and belief, by Samuel Yates. [Account against Yates with eight items amounting in all to \$57.79.] I further certify that I ceased to furnish labor on said building on the seventeenth day of October, 1898, and that Thomas F. McNulty and Frank W. Hoag, copartners as McNulty & Hoag agreed by and with the consent of Samuel Yates to pay the said Frank T. McKenna \$140 to paint the said building and I hereby claim a lien upon said building and upon the interest of the owner thereof in the lot of land upon which the same is situated, to secure the payment of the debt due me as aforesaid, and of the costs which may arise in enforcing said lien. Frank T. McKenna."

That in the drawing and filing of the foregoing statement the defendant, who is an attorney at law, acted as McKenna's counsel; but that he never discharged the lien of record or otherwise, even after the payment hereafter mentioned; that on December 16, 1898, Yates paid to the defendant as assignee for the benefit of creditors \$57.79, which was the full amount of the claim of lien;

that the defendant had been informed by McKenna before accepting the payment that the assignment of November 14, 1898, to the plaintiff had been executed and delivered, but he had never seen the instrument before the money was paid, and did not know its exact contents. The plaintiff claimed under the assignment of November 14, 1898.

The court was to find such facts and draw such inferences as might be deemed proper from the foregoing agreed statement, and to enter such judgment as the law might require.

The defendant requested the following rulings: 1. The plaintiff is not entitled to recover. 2. The plaintiff's assignment from McKenna did not give him any rights to the mechanic's lien of *McKenna v. Yates*. 3. If the defendant's assignment for the benefit of creditors did not authorize him to receive the money paid him by Yates, then the payment of such money by Yates was not a discharge, and the plaintiff under the facts stated could, through McKenna, prosecute the lien. 4. There is no express or implied promise of the defendant to the plaintiff on the facts stated to pay the sum claimed. 5. The defendant cannot apply the money received by him in any other way than his assignment states. 6. The mechanic's lien of *McKenna v. Yates* was not assignable, but even if it was assignable, the plaintiff as such assignee could not recover in his own name in this action. 7. The court should enter judgment for the defendant.

The judge refused to rule as requested by the defendant, and made the following findings and rulings: "Upon the agreed facts and drawing such inferences as may be drawn from said facts I find that the instrument marked 'A' [the assignment of November 14, 1898, from McKenna to the plaintiff] operated to assign to the plaintiff the debt due and unpaid from Thomas F. McNulty and Frank W. Hoag to Frank T. McKenna and carried with it the right to maintain an action in the name of said McKenna to enforce said lien against the real estate of said Samuel Yates. I find that said Yates paid to said John W. Connelly in ignorance of the assignment to the plaintiff, and in good faith, the amount of money chargeable, by virtue of said lien upon his real estate and that by reason of said payment his estate was relieved and discharged therefrom. I find that John

W. Connelly, the defendant, by reason of the fact that he was an assignee solely for the benefit of creditors and because he had knowledge of the prior assignment of the lien debt received the lien debt from Samuel Yates under a trust for the benefit of the plaintiff, and that an action for money had and received to the use of the plaintiff is an appropriate remedy for the recovery thereof. I refuse to make any of the rulings requested by the defendant."

The judge found for the plaintiff in the sum of \$64.32; and the defendant alleged exceptions.

H. A. Dubuque, for the defendant.

F. A. Pease, for the plaintiff.

MORTON, J. This is an action for money had and received. The case was heard by the court without a jury on an agreed statement of facts which gave the court power to draw inferences of fact. There was a finding for the plaintiff, and the case is here on the defendant's exceptions to the refusal of the court to give certain rulings that were asked for and to the rulings that were given.

The plaintiff claims under an assignment executed and delivered to him November 14, 1898, by one McKenna of all the claims and demands which he had against one Yates. It is agreed that on that day McKenna had a valid claim of mechanic's lien on the real estate of Yates. On November 16 McKenna duly filed in the registry of deeds a statement of said lien. The defendant claims under an assignment made to him on November 16 by said McKenna for the benefit of his creditors. On December 16 Yates paid to the defendant as assignee the amount of the lien. The judge found that the payment was made in good faith by Yates and in ignorance of the assignment to the defendant and found or ruled that it discharged the lien. The defendant who is an attorney at law drew and filed the statement of lien for McKenna, and was told by McKenna before accepting the payment from Yates that he had made the assignment to the plaintiff. But the defendant had never seen the instrument before the money was paid and did not know its exact contents. The statement of lien, a copy of which was annexed to the agreed statement of facts, set out in substance that McKenna furnished labor on a building belonging to Yates

by virtue of an agreement made by him with the consent of Yates with a firm by the name of McNulty and Hoag. The judge found that the assignment from McKenna to the plaintiff operated to assign the debt due McKenna from McNulty and Hoag and carried with it a right to maintain an action in the name of McKenna to enforce the lien against the real estate of Yates. The judge also found that by reason of his knowledge of the prior assignment to the plaintiff, and by reason of the fact that he was assignee solely for the benefit of creditors, the defendant received the money that was paid him by Yates in trust for the benefit of the plaintiff and ruled that the plaintiff could maintain an action for money had and received to recover it.

So far as the above rulings and findings relate to matters of fact they are not open to revision here. So far as they relate to matters of law we see no error in them. The assignment from McKenna to the plaintiff manifestly transferred to the plaintiff what was due McKenna from McNulty and Hoag and the right to enforce the lien in McKenna's name passed with the debt. The objection that there was no lien and that it could not be transferred is not well taken. The lien was created as soon as the labor was performed or furnished. *Clifton v. Foster*, 103 Mass. 238. The filing of the certificate was not necessary in order to create the lien. It simply kept the lien alive and prevented its dissolution so that proceedings could be taken to enforce it. *Clifton v. Foster, ubi supra*. We see nothing in the nature of a mechanic's lien which renders it unassignable, and there is nothing in the statutes creating such liens which forbids the assignment of them. The lien is intended as a security for those performing or furnishing labor or material or both, on real estate, and we see no reason why it should not pass with an assignment of the debt which it secures. See *Moore v. Dugan*, ante, 158; *Williams v. Weinbaum*, 178 Mass. 238; *Davis v. Bilsland*, 18 Wall. 659; *Murphy v. Adams*, 71 Maine, 113; *Phillips v. Vose*, 81 Maine, 134; *Chicago & Northeastern Railroad v. Sturgis*, 44 Mich. 588; *Midland Railway v. Wilcox*, 122 Ind. 84; *Hallahan v. Herbert*, 57 N. Y. 409; *Lawrence v. Congregational Church of Greenfield*, 164 N. Y. 115. It differs, we think, from a factor's lien or the lien which a mechanic has at common law on

a chattel for work and materials, and from other liens at common law on chattels. The latter kind of lien is as stated by Shaw, C. J., in *Doane v. Russell*, 3 Gray, 382, 384, a "personal right to detain" and not an interest in the property as a mechanic's lien under the statute is. For a collection of cases regarding the assignability of mechanics' liens, see 15 Am. & Eng. Encyc. of Law, (1st ed.) 102. If it is possible that the plaintiff might have availed himself of the mechanic's lien if he had so elected, which we do not intimate, he has not done so, and, under the circumstances, we think that the ruling by the court, that the payment by Yates to the defendant discharged the lien, was correct. The defendant received the money with notice of a prior assignment of the claim to the plaintiff, and we think that under St. 1897, c. 402, the plaintiff can maintain an action therefor in his own name. The fact that the defendant may have received it as assignee for the creditors cannot defeat the plaintiff's prior right. The money belongs to the plaintiff *ex æquo et bono*, and can be recovered in this form of action. *Goreley v. Butler*, 147 Mass. 8. *Hall v. Marston*, 17 Mass. 575. *Mason v. Waite*, 17 Mass. 560.

Exceptions overruled.

GLOUCESTER WATER SUPPLY COMPANY vs. CITY OF
GLOUCESTER.

Essex. December 6, 7, 1900. — June 19, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, BARKER,
HAMMOND, & LORING, JJ.

*Eminent Domain. Waterworks. Estoppel. Easement. Ancient Grant. Mill
Privilege. Gloucester.*

When land is taken for a reservoir "to take and hold water," all water which gathers in the reservoir from springs or by percolation, not flowing in a stream, by necessary implication also is taken.

Cases holding that the owner of water rights may treat the actual diversion of the water by a municipality or corporation having a statutory right to take water as a legal taking of it, may rest upon the ground that the defendant is estopped to deny that there has been a legal taking, and are not decisive of the question,

whether a man can be deprived of his property by an act *in pais* purporting to be done under the right of eminent domain unaccompanied by a writing or other declaration defining the measure of interference with his ownership of the property. Per LORING, J.

A corporation created for the purpose of supplying a city with water was given the right to take water from ponds. The charter contained a provision, that the corporation within a certain time "after the taking of any land or water rights" should file in the registry of deeds "a description of any land so taken" and a further provision, that no application should be made for the assessment of water rights until the water was "actually taken and diverted" by the corporation. The corporation took and diverted the water of a certain pond for less than a year, supplying the city with water therefrom while its principal reservoirs were in process of construction and then abandoned the use of the water of the pond and never resumed it. No description of the water taken was filed in the registry of deeds. *Held*, that, without deciding whether the actual diversion of water would be a legal taking of it within the meaning of the statute authorizing the taking, such a temporary use of the water for less than a year, then abandoned and never resumed, was not a legal taking of the water within the meaning of the act as against a person who had rights in that water and who had not elected to treat it as a taking of it.

An easement created by grant is not lost by non-user.

St. 1881, c. 187, created a corporation for the purpose of supplying the city of Gloucester with water. Section 8 required the corporation, after the taking of any land or water rights under the provisions of the act "otherwise than by purchase" to file in the registry of deeds a description of the land so taken. *Held*, that the corporation had the power, recognized as above, to acquire land and water rights by purchase, as an incident to its business of securing and selling water, and that under this power it could purchase and hold a privilege of damming and flooding formerly used by a saw mill, although the running of a mill was beyond its charter powers.

In 1682 the town of Gloucester voted at a town meeting that "Jacob Davis and others joyninge along with him hath liberty of the streame at the head of the Little River to sett up a saw milne." *Held*, that by this grant, though without words of inheritance, a fee in the easement passed to the grantees. The rigid rules of construction applicable to modern conveyances are not to be applied to transactions of this kind, which took place soon after the settlement of the country when conveyancing was little understood. For the same reason the easement granted was not limited to damming the waters of the stream for the purpose of running a saw mill.

The ownership of a mill privilege, giving the right to dam a certain stream and flood a certain meadow, does not give the right to withdraw all the water that collects in the pond thus formed and sell it to the inhabitants of a city.

St. 1895, c. 451, § 16, provided for the purchase by the city of Gloucester from the Gloucester Water Supply Company of all the corporate property rights, privileges, easements, lands, waters, water rights, dams, reservoirs and appliances owned by that company and used in supplying the city with water. The water company had acquired by deed a mill privilege in a certain stream and a pond created by damming it. It had used the waters of the pond temporarily to supply the city with water while constructing its reservoirs, and had then discontinued the use. It did not own the land under the pond. The city objected to paying for the mill privilege on the grounds, that the waters of the pond were not in actual use when the property of the water company was transferred to

the city, that the mill privilege did not give the right to use the pond as a water supply and that the waters of the pond could not so be used without acquiring a fee in the bottom of the pond. *Held*, that the city had the right to acquire the fee in the bottom of the pond, that without acquiring the mill privilege the pond could not be used as a water supply, that the mill privilege was of value as a step towards the ownership of the pond as an auxiliary water supply, and that the mill privilege was the property of the water company owned and used by it within the meaning of the section above named.

St. 1895, c. 451, an act enabling the city of Gloucester to supply itself and its inhabitants with water, by § 16 made that right conditional on the city's purchasing the property of the Gloucester Water Supply Company, if that company should elect to sell its property to the city, and in that case provided, that "said city shall pay to said company the fair value thereof" and that "such value shall be estimated without enhancement on account of the future earning capacity, or future good will, or on account of the franchise of said company." Commissioners, appointed to value the property under the provisions of the act, excluded evidence of past earnings of the water company, and allowed the sum of \$75,000 in addition to the cost of duplication of the plant less depreciation, in consideration of the fact that the plant was a going concern and in full operation at the time of the transfer. They allowed nothing for the powers of the water company which had never been exercised, to take additional sources of water supply, but considered the existence of such supplementary sources so far as they prevented impairment of the property on the ground that the company's sources shortly might be exhausted. The commissioners found "the fair value" of the property transferred by the company to the city September 24, 1895, "to be the sum of \$600,500, with interest from September 24, 1895." They fixed the amount of costs, including their own fees, and apportioned them between the parties. *Held*, that the evidence of past earnings rightly was excluded. The franchise of the water company was not exclusive, but so long as it had no competitor it was practically in the enjoyment of an exclusive franchise, so that the earnings during this period were not proper evidence of the "fair value" of the property. *Held, also*, that the allowance above the cost of duplication, less depreciation because the corporation was sold as a going concern was justified, and that there was nothing in St. 1895, c. 451, forbidding it. Whether the provisions of the act, excluding future earning capacity and future good will, would allow present earning capacity and present good will to be taken into account or not, the element of value that came from the property being sold as a going concern was not excluded from consideration by the provisions of the act. *Held, also*, that the commissioners rightly allowed nothing for the unused powers of the water company to acquire additional sources of water supply. These rights could be revoked and were in fact revoked by St. 1895, c. 451. *Held, also*, that the commissioners properly could adopt, as a basis of their valuation, the value of the property at the date of its transfer to the city adding interest to the date of payment. *Held, also*, that any objection to the reasonableness of the fees charged by the commissioners must be made before a single justice.

PETITION to determine the value of the petitioner's water plant purchased by the respondent on September 24, 1895, under St. 1895, c. 451, § 16, filed October 29, 1895.

Commissioners were appointed under the provisions of the

act, who reported that the value of the plant, exclusive of any allowance for the franchise and rights other than the water rights of the company, and excluding all evidence as to the past earning capacity of the company, was \$600,500, and that the petitioner should recover that amount with interest from September 24, 1895, less the sum of \$3,955.40, which it was agreed should be deducted therefrom.

The case coming on to be heard before *Loring, J.*, both parties moved that the report be recommitted to the commissioners with instructions. At the request of the parties, the justice reserved the case for the consideration of the full court, upon the motions of the parties and the questions of the acceptance or recommitment of the award, it being agreed that any questions of law raised by either party and appearing in the award, or raised by the motion of either party to recommit the award, should be thus reserved.

The Gloucester Water Supply Company was incorporated under St. 1881, c. 167, for the purpose of furnishing pure water to the inhabitants of Gloucester. This statute authorized the corporation to take, hold and convey through the city the water of any springs, natural ponds, brooks or other water sources in Ward 8 of that city, and to take and hold, by purchase or otherwise, any real estate necessary for the preservation and purity of the same, or for forming any dams or reservoirs to hold the same, and for laying and maintaining aqueducts and pipes for distributing the water so taken and held; to lay pipes, and to do any other acts convenient and proper for carrying out the purposes of the act. It further provided, that the corporation should, within sixty days after the taking of any land or water rights otherwise than by purchase, file in the registry of deeds a description of the land so taken, with a statement of the purposes for which it was taken. The company was further authorized to establish and fix water rates, and to make contracts for the supply of water with the city or with individuals or corporations. Section 7 provided that the city should have the right to purchase the corporate property and the rights and privileges of the company.

The company was organized under this act, and in 1884 took certain tracts of land in Ward 8, which takings were duly re-

corded, made the necessary excavations, built dams and established reservoirs, and thereby took and held waters in Dikes and Wallace reservoirs, which constituted the sources of supply principally used by the company. Also, it bought in 1884 an ancient mill privilege near Freeman's swamp, so called, in Ward 8, which, as the petitioner alleged, entitled it to flow the meadows forming the bed of Lily Pond, and to have the water from Lily Pond run through Freeman's swamp from the dam at the pond to a small basin upon the mill site, and it actually took and used the waters of Lily Pond as a temporary water supply, while Dikes and Wallace reservoirs were in process of construction.

The ancient mill privilege, under which Lily Pond was created by damming Little River, was conveyed by Nathaniel Webster to the petitioner in 1884. It was originally derived from a grant made by the town of Gloucester, December 19, 1682, when at a town meeting it was voted that "Jacob Davis and others joyninge along with him hath liberty of the streame at the head of the Little River to sett up a saw milne."

From these various sources the company supplied the city and its inhabitants with water from 1885 until the transfer to the city on September 24, 1895, and since that time the city had used the same sources, except that Lily Pond water had not been drawn upon since 1886. After that year the petitioner did not use the waters of Lily Pond for any purpose whatever.

Section 3 of the petitioner's charter was as follows: "Said corporation shall, within sixty days after the taking of any land or water rights under the provisions of this act, otherwise than by purchase, file in the registry of deeds for the southern district of the county of Essex a description of any land so taken, sufficiently accurate for identification, with a statement of the purposes for which it is so taken, and the title of the land so taken shall vest in said corporation. Any person or corporation injured in property by any acts of said corporation, and failing to agree with said corporation as to the amount of damages, may have the same assessed and determined in the manner provided when land is taken for highways; but no application shall be made to the county commissioners for the assessment of damages for the taking of water rights until the water is actually taken and diverted by said corporation. Any person whose

water rights are thus taken or affected may apply as aforesaid within three years from the time the water is actually withdrawn or diverted, and not thereafter; and no suit for injury done under this act shall be brought after three years from the date of the alleged receipt of injury."

St. 1895, c. 451, authorized the city of Gloucester to supply itself and its inhabitants with water, but provided in § 16, that if, within thirty days after the act should be accepted by the city, the water company should notify the city that it desired to sell to the city "all the corporate property and all the rights, privileges, easements, lands, waters, water rights, dams, reservoirs, pipes, engines, boilers, machinery, fixtures, hydrants, tools and all appliances owned by said company, and used in supplying said city and the inhabitants thereof with water," the city should not proceed to establish its own plant unless it should first purchase of the company the property aforesaid. The same section further provided that if the parties should be unable to agree upon the value of the property this court upon application of either party should appoint three commissioners to determine "the fair value of said property," and that such value should "be estimated without enhancement on account of future earning capacity, or future good will, or on account of the franchise of said company."

The commissioners in their report stated, that, except where the terms of the two acts differed, they had valued the property by the same methods that were employed in the case of *Newburyport Water Co. v. Newburyport*, 168 Mass. 541.

Those portions of the report of the commissioners which are necessary to an understanding of the points decided by the court are stated or described in the opinion. The report concluded as follows:

"At the request of the respondent we have made the following findings, based upon its claim that we should not make certain allowances which we have included in the award hereinafter made, of \$600,000, or \$600,500, as the case may be:

"1. If the petitioner is not entitled to recover for the Dikes and Wallace reservoir property, including the water and water rights, lands and physical structure, the award hereinafter made is to be reduced \$220,000, *i. e.*, \$175,000 for the water and water

rights, and \$45,000 for the physical structure and the lands connected therewith.

"2. If it is entitled to recover for the Dikes and Wallace reservoirs, including the lands and all physical structures connected with the water rights, but not for the water, the award hereinafter made is to be reduced \$175,000.

"3. If Lily Pond water and water rights are not to be valued for domestic purposes, it is to be lessened \$20,000; and if the city, upon the facts, is not required to pay anything for the water rights purporting to be conveyed to the petitioner under the Webster deed, on account of forfeiture under the mill grant, or for any reason, then an additional sum of \$4,650 is to be deducted.

"4. If not for the mill lot, including the pumping station, to be reduced by \$11,500; excluding the station, by \$250. [This point was waived by the defendant at the argument.]

"5. If not for the second lot in the Webster deed, the reduction is to be \$100.

"If it is held that the petitioner may recover for the water and water rights of Lily Pond, as herein set forth, but that it had, or the city has, no right to take the land in the pond owned by the railroad company outside of its location, the amount of this award hereinafter stated ought to be reconsidered so far as the valuation of Lily Pond water and water rights are concerned.

"It appeared that the city has been using the water plant, taking its water from the Dikes and Wallace reservoirs alone, since the date of the transfer.

"Upon consideration of the premises, we determined the fair value of the property transferred by the company to the city September 24, 1895, and which was owned by the company and used in supplying the city and the inhabitants thereof with water, as hereinbefore described, to be the sum of \$600,500, with interest from September 24, 1895. But if the court shall determine that there had been no valid taking of the water and water rights, but despite this fact the same are to be valued and paid for, upon the principle already stated in this report, *i. e.*, that such defect, if any, can be cured for \$500, then the said award should be \$600,000, with interest from September 24, 1895. From the amount of the award, in any event, is to be deducted,

as of the time of the transfer, the sum of \$3,955.40, being the amount agreed upon to be so deducted upon an accounting between the city and the company.

"This property is subject to an existing mortgage made to secure outstanding bonds to the amount of \$250,000, bearing interest at five per cent per annum, payable January 1 and July 1, and maturing January 1, 1905. If, at the time of the payment of the award, any of these bonds remain outstanding, an amount sufficient shall be retained by the city to indemnify, and save itself harmless for the payment of these bonds when they mature.

"We award that the costs shall be \$27,000, of which the petitioner shall pay \$5,500, and the balance shall be paid by the respondent. Any amount allowed by the court, and paid by the county of Essex, on account of the costs or fees of the commissioners, shall be credited and paid to the respondent. The petitioner, having paid all the costs, may recover all but \$5,500 from the respondent. Everett C. Bumpus, John R. Freeman, John W. Ellis, Commissioners."

The respondent contended, that the petitioner had no title to the water or water rights of Dikes and Wallace reservoirs, and no rights in Lily Pond as a source of water supply. The respondent further contended, that no allowance should be made for the fact that the plant was a going concern, and in full operation at the time of the transfer, and that the commissioners were not authorized to award interest on the amount of the valuation, or to fix their fees and determine how they should be apportioned between the parties.

The petitioner, on the other hand, contended that the commissioners were right in their rulings against the respondent upon the points above stated, and contended, that it was entitled also to compensation for its rights in the streets, its right to establish and collect water rates, and its rights to use various other sources of water supply in Ward 8, for which no compensation was allowed by the commissioners. The petitioner further contended that, in determining the value of the plant, the commissioners should have admitted the evidence of past earnings. The contentions of the parties are stated more fully in the opinion of the court.

The case was argued at the bar in December, 1900, and afterwards was submitted on briefs to all the justices.

R. M. Morse, (*F. L. Evans* with him,) for the petitioner.

A. E. Pillsbury, (*C. A. Russell* with him,) for the respondent.

LORING, J. 1. The respondent's first contention is that in estimating the value of the Dikes and Wallace reservoirs the water company is not entitled to include the value of any water or water rights.

These two reservoirs formed the water supply which was in use on September 24, 1895, when the petitioner's plant was transferred to the respondent city. The water which feeds these reservoirs was obtained by digging out two swamps and damming up their outlets. No brook flowed into either swamp in its natural state, but the water collected in the reservoirs "gathers" there, coming from the watersheds of the neighboring land; both swamps were taken in 1884 by the water company, and written descriptions of their bounds were filed in the registry of deeds under St. 1881, c. 167, § 3. In these descriptions it is stated, among other things, that "the above land, or real estate, has been taken . . . for forming and erecting dams, reservoirs, to take and hold water for the purposes above set forth, . . . and such other use and purpose as may be necessary and may be authorized by said act."

We are of opinion that this was a valid taking of the water which "gathers" in the reservoirs. Where land is taken for a reservoir "to take and hold water," all water which "gathers" in the reservoir from springs or by percolation, and none of which flows into the reservoir from a stream, is also impliedly taken. In such a case, the requirements of an adverse taking of such water under the right of eminent domain are complied with. See *Glover v. Boston*, 14 Gray, 282, 288; *Kenison v. Arlington*, 144 Mass. 456; *Hollingsworth & Vose Co. v. Foxborough Water Supply District*, 165 Mass. 186, 189; *Lexington Print Works v. Canton*, 167 Mass. 341, 344. Where a reservoir is fed by the waters of a brook which has been taken, in terms, by the water company, and is also fed by water which "gathers" in the reservoir, as water gathers in a well, it would be impracticable to hold that the only water to which the company had a title was the water of the brook, and that it had no title to the water

which gathered in the reservoir. Land cannot be used as a reservoir by a water company without the water company having a right to the water which "gathers" in the bottom of it by percolation or from springs.

We are therefore of opinion that in estimating the value of Dikes and Wallace reservoirs the water company is entitled to the value of the water which "gathers" there.

2. The objection originally taken by the respondent to the water company's title to the land on which the pumping station stands was waived at the argument.

3. As to the waters of Lily Pond: We are of opinion, on the one hand, that the water company had no right to use these waters for domestic purposes, and therefore that \$20,000 must be deducted from the amount of the award; but, on the other hand, we are of opinion that the water company did own the right to flow Lily Pond and to use its waters for mill purposes, and therefore that the \$4,650 allowed by the commissioners is not to be deducted from the amount of the award.

The only ground on which the water company claims the right to use these waters for domestic purposes is that for part of the year 1885-1886, while Dikes and Wallace reservoirs were being built, it used the waters of this pond in supplying the respondent city and its inhabitants with water. The water company contends that "the actual appropriation and diversion of the waters was sufficient to constitute a legal taking," and relies upon *Moore v. Boston*, 8 Cush. 274, *Bailey v. Woburn*, 126 Mass. 416, *Cowdrey v. Woburn*, 136 Mass. 409, and *Northborough v. County Commissioners*, 138 Mass. 263. In addition to these cases cited by the water company is the case of *Brickett v. Haverhill Aqueduct Co.* 142 Mass. 394. The respondent relies principally upon the decision in the case of *Warren v. Spencer Water Co.* 143 Mass. 9, and upon the case of *Hamor v. Bar Harbor Water Co.* 78 Maine, 127.

Whether the actual diversion of water is a legal taking of it, is a question on which the cases in this Commonwealth are not in entire harmony.

It seems to have been held in *Brickett v. Haverhill Aqueduct Co.* 142 Mass. 394, that the actual diversion of water was in that case a legal taking of it. It appears from the original

papers in that case that a permanent dam had been built across the outlet of the pond whose waters were alleged by the plaintiff to have been tortiously used to his, the plaintiff's, detriment, and a pumping station had been built in connection with it; and it was stated in the bill of exceptions "that the operations of the company as aforesaid were under the assumed authority of said chapter [St. 1867, c. 73], and were necessary for the purposes of said act." In that case, there was no pretence that the defendant had passed any vote stating that the waters of the pond in question, or any part of them, had been taken. The act in question (St. 1867, c. 73), gave the defendant aqueduct company authority to take the waters of the pond and to enter upon and dig up any land through which it might decide to lay its pipes; but it did not require any description, either of the land or of the water rights taken by it, to be filed in the registry of deeds or elsewhere. It appears from the brief of the defendant in that case that there are many acts in this Commonwealth drawn like the act there in question. See Sts. 1839, c. 114; 1845, c. 90; 1850, cc. 192, 198, 273; 1852, c. 210; 1856, c. 241; 1857, c. 135. These are all acts which, like St. 1867, c. 73, authorize the taking of water and land without stating in what the taking shall consist or requiring a description either of the land or of the water taken to be filed in the registry of deeds or elsewhere.

On the other hand, *Warren v. Spencer Water Co.* 143 Mass. 9, seems to be a decision the other way. The statute there in question (St. 1882, c. 119) authorized the water company to take the waters of any brook, and to take any real estate necessary for its use, and provided that the company should "cause to be recorded in the registry of deeds for the county of Worcester a description of any land so taken," but made no provision as to requiring, there or elsewhere, a description of the waters taken by the water company. The declaration in *Warren v. Spencer Water Co.* contained two counts, one for entering upon the plaintiff's land and laying pipes therein, and the second for deflecting the waters of a brook which had formerly flowed through her (the plaintiff's) pasture. The presiding judge ruled, with respect to the second count, that "the turning of the water of Shaw Pond by the defendant's servants into its pipes, in the absence of any other act or proceeding of the corporation in

relation thereto, was not such a taking of the water or of water rights under the statute as would preclude the plaintiff from maintaining an action of tort for the diversion of the waters from the brook running through her pasture"; and an exception to that ruling was overruled, although the question was not discussed in the opinion delivered by this court. And it is of some importance that there are many statutes like the statute in question in *Warren v. Spencer Water Co.*, which provide that the water company may take land and water, and then provide that if land is taken a description of it shall be filed in the registry of deeds, making no provision as to what must be done with respect to water taken by the water company under the act. Among such statutes are Sts. 1865, c. 132; 1866, c. 175; 1867, cc. 84, 272; 1868, c. 182; 1871, cc. 218, 307; 1872, c. 345; 1873, c. 242; 1874, c. 191; 1876, c. 42; 1880, cc. 127, 179, 208; and St. 1882, cc. 119, 142.

And finally, in *Moore v. Boston*, there is a statement that the legal taking is the actual use of the property taken, as is shown by the fact that it is a description of a previous taking that is to be filed in the registry of deeds. The act in question in *Moore v. Boston*, was not drawn like either of the two classes of acts already spoken of. That act (St. 1846, c. 167) authorized the respondent city to take water and land in order to supply its inhabitants with water, and provided: "The city of Boston shall, within sixty days from the time they shall take any lands, or ponds, or streams of water, for the purposes of this act, file, in the office of the registry of deeds, for the county where they are situate, a description of the lands, ponds, or streams of water so taken." A parcel of land belonging to the petitioner's estate was actually used by the respondent city for the purpose of building an aqueduct passing through it, during her lifetime, and a description of the land so taken was filed in the registry of deeds after her death. It was held that the petition for compensation was properly brought by the administrator, and on the ground that the exercise of the physical dominion over the property which it was contended had been taken was the legal taking of that property. There is a similar statement in *Northborough v. County Commissioners*, 138 Mass. 263, in which it was held that a petition for damages must be brought within one year after

water has been actually diverted, under a statute which provides that the petition shall be brought "within one year after the taking of such land, water source or water right, or other injury done as aforesaid, and not thereafter. No assessment for damage shall be made for the taking of any water right, or for any injury thereto, until the water is actually withdrawn or diverted." See St. 1882, c. 192, § 3. The conclusion reached in that case puts the statute there in question on the same footing as the act in the case at bar (St. 1881, c. 167, § 3), which is a common, if not a usual, form of limitation of such petitions. In the act in the case at bar, it is provided that the petition shall be brought "within three years from the time the water is actually withdrawn or diverted, and not thereafter."

Bailey v. Woburn, 126 Mass. 416, and *Cowdrey v. Woburn*, 136 Mass. 409, are cases where the owner of the land did not undertake to assert that his land had not been taken, but where he was seeking to obtain damages on the footing that it had been taken, and may well rest upon the ground that in such a case the water company or the respondent city is estopped to deny that there is no legal taking, even if there has been no legal taking. *Spaulding v. Arlington*, 126 Mass. 492, 494. *Lewis v. Boston*, 130 Mass. 339. *Moore v. Boston*, 8 Cush. 274, and *Northborough v. County Commissioners*, 138 Mass. 263, 266, are also cases where the owner of the land was seeking to obtain compensation on the footing that his property had been taken, and are not cases where he was asserting his right to his property as still his own, in spite of what had been done by the respondent city or company, and therefore are not cases which are decisive of the question whether a man can be deprived of his property by an act *in pais*, unaccompanied by a writing or other declaration defining the measure of interference with his ownership of the property which it is claimed has been taken under the exercise of the right of eminent domain. See *Glover v. Boston*, 14 Gray, 282, 288; *Kenison v. Arlington*, 144 Mass. 456; *Hollingsworth & Vose Co. v. Foxborough Water Supply District*, 165 Mass. 186, 189; and *Lexington Print Works v. Canton*, 167 Mass. 341, 344.

In connection with *Moore v. Boston* and *Northborough v. County Commissioners*, which was decided on the authority of *Moore v. Boston*, it is important to note that the case of *David-*

son v. Boston & Maine Railroad, 3 Cush. 91, on which the decision in *Moore v. Boston* was largely based, was subsequently explained to be a case resting on the doctrine of estoppel; that is to say, a case in which the respondent railroad company, having used the petitioner's land, was estopped to say that it had not taken his land, when the use it had made of it could only be justified by it if it had, in fact, taken his land. To that effect, see Shaw, C. J., in *Boston & Providence Railroad v. Midland Railroad*, 1 Gray, 340, 361. See also *Drury v. Midland Railroad*, 127 Mass. 571, 580. Moreover, it is well settled, in case a railroad constructs its roadbed on the land of the plaintiff, that the plaintiff may, at his election, assert his title to his land and to the rails affixed to it by the railroad; *Meriam v. Brown*, 128 Mass. 391; or he may at his election bring a petition for compensation on the ground that the defendant is estopped to say that the land has not been taken. *Boston & Providence Railroad v. Midland Railroad*, 1 Gray, 340, 361. *Drury v. Midland Railroad*, 127 Mass. 571, 580. In the case of a railroad, the filing of the location is the act of taking. *Charlestown Branch Railroad v. County Commissioners*, 7 Met. 78. *Hazen v. Boston & Maine Railroad*, 2 Gray, 574, 580. *Chandler v. Jamaica Pond Aqueduct*, 114 Mass. 575, 577. Finally in *Saunders v. Lowell*, 131 Mass. 387, 388, *Moore v. Boston* is treated as a case resting on this doctrine of estoppel.

It is not necessary in this case to decide the abstract question which we have been discussing. However that question may be decided, we are of opinion that such an equivocal act as the temporary use of water for less than a year, which use is then abandoned and has never since then been resumed, is not a legal taking of that water under St. 1881, c. 167, § 2, as against a person who has rights in the water in question and who has not elected to treat it as a taking of it. The respondent city in objecting to the title of the water company to the waters of Lily Pond has a right to test its title by the question whether the rights of such a person have been extinguished.

For these reasons, we are of opinion that the \$20,000 allowed as the value of the waters of Lily Pond for domestic purposes must be deducted from the amount of the award.

But we are of opinion that the \$4,650 allowed for the value

of the right to use the waters of Lily Pond for a mill privilege must stand.

The respondent city contends that the mill privilege which was conveyed to the water company by the Webster deed had been previously extinguished by abandonment. It bases this claim on the fact that in 1873 the sawmill and the net and twine mill then at the mill pond were destroyed by fire, and that no use was made of the waters of Lily Pond after that, until they were temporarily used by the water company in supplying the respondent city and its inhabitants with water during a part of the year 1885 to 1886, while Dikes and Wallace reservoirs were being constructed. The respondent also contends that under its charter the water company could not acquire title to any land or water rights by purchase, and could not acquire a mill privilege at all; and finally, that under the terms of the original grant in 1682, a fee did not pass in the easement thereby created, but only a life estate. But we are of opinion that the mill privilege has not been extinguished by abandonment. The easement was created by grant, and in such a case it is not lost by non-user. *Butterfield v. Reed*, 160 Mass. 361, 369. The cases of *French v. Braintree Manuf. Co.* 23 Pick. 216, *Fitch v. Stevens*, 4 Met. 426, *Hodges v. Hodges*, 5 Met. 205, were cases involving a right to maintain a dam under the mill acts, and rest on other principles. The right of the water company to acquire land or water rights by purchase is plain; it is recognized in the third section of its charter. And we are of opinion that, as an incident to its business of securing and selling water, it could purchase and hold this privilege of damming the waters and flooding the Lily Pond meadow, although the running of a mill was beyond its charter powers. *Brown v. Winnisimmet Co.* 11 Allen, 326. And further, that although no words of inheritance were used in the original grant by the town of Gloucester to "Jacob Davis and others joyninge along with him" made in 1682, a fee in the easement passed to the grantees. It is well settled that the rigid rules of construction which are applicable to modern conveyances are not to be applied to transactions of the kind in question, which took place early after the settlement of the country, when conveyancing was little understood. *Adams v. Frothingham*, 3 Mass. 352. *Stoughton v. Baker*, 4 Mass. 522.

Ipswich Grammar School v. Andrews, 8 Met. 584, 592. *Green v. Putnam*, 8 Cush. 21, 25. For the same reason, the easement granted was not limited to damming the waters of the stream for the purpose of running a sawmill. *Adams v. Frothingham*, 3 Mass. 352. On the other hand, the ownership of the mill privilege did not give the water company the right to withdraw all the water that collects in Lily Pond and sell it to the respondent city and its inhabitants, and for that reason, the \$20,000 allowed by the commissioners must be deducted as we have already stated.

The respondent further contends that the \$4,650 allowed by the commissioners must be deducted from the award, because the waters of Lily Pond were not in actual use when the property of the water company was transferred to the city, because the title to use the waters of Lily Pond as a part of the mill privilege in the waters of Little River does not confer a perfect title to the waters of Lily Pond upon the city, and finally, because the waters of that pond cannot be made fit for the purposes of a domestic water supply without acquiring the fee in the bottom of the pond. But it is plain that the city has the power to acquire the fee in the bottom of the pond, and it is also plain that the waters of Lily Pond had been used in furnishing the respondent city and its inhabitants with water in 1885 and 1886, and that without the ownership of the mill privilege in Little River these waters could not have been so used. The mill privilege is of value as a step toward the ownership of the waters of Lily Pond as an auxiliary supply, and those waters having once been used by the water company in supplying the respondent city and its inhabitants with water, the mill privilege is the property of the water company, owned and used within St. 1895, c. 451, § 16.

4. It will be convenient to consider the respondent's contention that the commissioners had no right to award the \$75,000 allowed by them in addition to the cost of duplication of the water company's plant, less depreciation, in connection with the water company's contention that evidence of past earnings of the water company should have been admitted in evidence.

The act under which the award was made (St. 1895, c. 451) is an act enabling the city of Gloucester to "supply itself and

its inhabitants with water." By § 16 of that act, that right is made conditional on its, the city's, purchasing the property of the water company in case the water company elects to sell its property to the city. In case the city agrees to buy the water company's property, under an offer of the water company made under the provisions of that section, it is provided that "said city shall pay to said company the fair value thereof. . . . Such value shall be estimated without enhancement on account of future earning capacity, or future good will, or on account of the franchise of said company."

In determining the true construction of these provisions of § 16, it is important to bear in mind the purpose, which the Legislature had, in making the right of the city to supply itself with water conditional on its buying the company's property, in case the company elected to sell it to the city, and in providing that in ascertaining the "fair value" of that property, it should not be enhanced "on account of future earning capacity, or future good will, or on account of the franchise of said company."

On the one hand, it is plain that a private water company organized for net profits cannot hope to compete with a city, which can rely upon taxes to supply a deficit in operating expenses. For that reason, it is also plain that if the Legislature had not required the city to buy the water company's property, the company's property would have been practically, though not legally, confiscated. No doubt, therefore, can arise as to the reasons for the insertion of the clause in § 16 providing that the value shall not be enhanced "on account of the franchise of said company." The franchise of the Gloucester Water Supply Company was not an exclusive franchise. The grant of a similar franchise to the city of Gloucester to supply itself and its inhabitants with water was not a violation of the franchise rights of the Gloucester Water Supply Company; and finally, the sale to the city was not obligatory on the water company. The company was given the option of selling its property to the city or of going on in competition with the city, under the act in question. Under these circumstances, it is plain that the value of the company's property, which the city is compelled to buy, ought not to be enhanced "on account of the franchise of said company."

It is also plain, so long as a water company has no competitor in supplying a town or city with water, it is practically in the enjoyment of an exclusive franchise, although its franchise is not legally an exclusive one. For that reason, the past earnings of this company were not evidence of the "fair value" of this property. The earnings of a company which is in the enjoyment of what is practically an exclusive franchise are not a criterion of the "fair value" of the property apart from an exclusive franchise. We are of opinion that the evidence of past earnings offered by the water company was properly excluded. *Newburyport Water Co. v. Newburyport*, 168 Mass. 541.

It is argued by the petitioner that the admissibility of such evidence derives support from St. 1891, c. 370, § 12, which provides that in determining the "fair market value" of a gas or electric plant under similar circumstances "the earning capacity of such plant based upon the actual earnings being derived from such use at the time of the final vote of such city or town to establish a plant" is to be included "as an element of value"; but this clause as to the earning capacity being considered as an element of value was omitted from the act in question.

The only doubt as to the propriety of the allowance of a sum in addition to the cost of duplication, less depreciation, of the water company's plant is whether the principles on which the commissioners proceeded were sufficiently favorable to the water company.

It is plain that the real, commercial, market value of the property of the water company is, or may be, in fact, greater than "the cost of duplication, less depreciation, of the different features of the physical plant." Take, for example, a manufacturing plant: Suppose a manufacturing plant has been established for some ten years and is doing a good business and is sold as a going concern; it will sell for more on the market than a similar plant reproduced physically would sell for immediately on its completion, before it had acquired any business. *National Waterworks Co. v. Kansas City*, 62 Fed. Rep. 853.

We think it is plain that there is nothing in the provisions of § 16 of the act in question, St. 1895, c. 451, forbidding the commissioners considering this element of value which, as we have seen, in fact exists. The provisions of the act are that the

"fair value . . . shall be estimated without enhancement on account of future earning capacity, or future good will, or on account of the franchise of said company." Whether that would allow present earning capacity and present good will, apart from the franchise, to be taken into account, as distinguished from future earning capacity and future good will, need not be considered. It is plain that the element of value, which comes from the fact that the property is sold as a going concern, in which case it has, or may have, in fact, a greater market value than the same property reproduced in its physical features, is not excluded from consideration by that provision of the statute.

It is also plain that the commissioners, in allowing the \$75,000 allowed by them in addition to the cost of duplication, less depreciation, of the plant in its physical features, did not go beyond this. They state that in their opinion "the cost of duplication, less depreciation, of the different features of the physical plant, . . . does not represent a fair valuation of this plant, welded together, not only fit and prepared to do business, but having brought that business into such a condition that there is an enhanced value created thereby, so that the city in purchasing it, without considering its income or right to do business, but having the power to carry it on on its own account, should pay more for the property as such than as if this consideration did not obtain. This is a value that we have found to be seventy-five thousand dollars (\$75,000) that has been imported into the plant, which seems to us as much a part of the property valuation as any other part of it."

5. We are of opinion that the commissioners could properly adopt, as a basis of their valuation, the value of the property at the date of its transfer to the city, adding interest to the date of payment.

6. The objection made by the respondent to the reasonableness of the fees charged by the commissioners must be raised before a single justice of this court.

7. The right to have the report recommitted because the company had a right to take additional sources of water supply in Ward 8, to lay and maintain pipes in the streets, and to charge water rates, was not raised in the commissioners' report, nor is it mentioned in the motion to recommit that report, and

therefore it is not open, under the terms of the report reserving the case for this court; but we think that the water company got all the advantage to which it was entitled by its authority to take additional sources of water supply. The commissioners found that "the failure to take and create property by the exercise of its franchise rights gives nothing that we can appraise under the statute. We, however, permitted the petitioner's experts to take into consideration the effect upon the value, if any, of the water rights owned by the company by the presence of these additional supplies. We did not, after considering the amount of the available water supply of the company in 1895, enhance the value of its supply on account of the presence of the supplementary sources, but the fact that they could be so employed prevented any impairment under any claim that the company's sources would be shortly exhausted, and therefore likely to be abandoned."

Apart from these considerations, we think the commissioners were correct in not considering these rights of the water company. These rights could be revoked, and were revoked by St. 1895, c. 451.

The following sums are to be deducted from the total award made by the commissioners: (1) \$20,000 for water rights in Lily Pond; (2) \$3,955.40, an amount agreed upon between the parties. The report of the commissioners should be affirmed as a report for \$576,544.60, with interest from September 24, 1895; but the case is to stand for hearing on the amount to which the petitioner is entitled by its payment of the costs charged by the commissioners.

So ordered.

JOSEPH STONE & others, trustees, vs. JOSEPH W. HEATH
& others.

Middlesex. January 23, 1901. — June 19, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

Board of Health. Superior Court. Equity Jurisdiction. Nuisance. Water Supply.

The jurisdiction over nuisances given to town boards of health by Pub. Sts. c. 80, §§ 20-27, is summary in its nature, and the orders made thereunder are not subject to judicial examination and revision at the instance of parties affected by them before they are carried out. After they are carried out, however, the questions whether there was a nuisance, and, if so, whether it was caused or maintained by the parties charged therewith, may be litigated.

The Superior Court has no power, either under its general equity jurisdiction or under Pub. Sts. c. 80, § 26, to grant an injunction to restrain a town board of health from exercising the summary jurisdiction to abate nuisances given to it by Pub. Sts. c. 80, §§ 20-27.

St. 1897, c. 510, does not give the State board of health exclusive jurisdiction of nuisances affecting the purity of the sources of water supply. There is nothing in that statute which takes away or limits the power of local boards of health to deal with nuisances in their respective jurisdictions.

Under Pub. Sts. c. 80, § 20, giving town boards of health the power to examine into, destroy, remove or prevent "all nuisances, sources of filth, and causes of sickness" within the town, those boards have jurisdiction over nuisances affecting the purity of the water supply as well as other causes of sickness.

When a town board of health has adjudged that a nuisance exists, the question what influences or motives may have set the board in motion is immaterial.

It furnishes no ground for interference with a town board of health, who have adjudged certain deposits on land of the plaintiff to be a nuisance as creating danger of pollution to the water supply of the town, that the action of the board was taken with a view to affecting proceedings in a suit pending in the Superior Court between the plaintiff and the company supplying the town with water.

Where a town board of health adjudged certain deposits on land of the plaintiff to be a nuisance, and the plaintiff's land and deposits thereon of the character complained of lay partly in the town to which the board belonged and partly in an adjoining town, it was held, that the order of the board must be taken as limited in its scope to the town to which the board belonged, and an objection that it was in excess of their jurisdiction was not well founded.

BILL IN EQUITY praying for an injunction against the board of health of the town of Wakefield, to restrain them from entering on certain lands of the plaintiffs to abate an alleged nuisance, and from commencing or prosecuting any proceedings against

the plaintiffs on account of the alleged nuisance, filed February 8, 1900.

The defendants demurred on the grounds, that the plaintiffs had not stated a case which entitled them to relief in equity, and that they had an adequate remedy at law. In the Superior Court *Mason*, C. J., made a decree sustaining the demurrer and dismissing the bill; and the plaintiffs appealed.

F. M. Forbush, for the plaintiffs.

S. K. Hamilton, for the defendants.

MORTON, J. The defendants are the board of health of the town of Wakefield, and as such, it is alleged in the bill, have adjudged that a nuisance exists on the premises of the plaintiffs and have ordered them to abate it. The bill has been brought to restrain the defendants from entering on the plaintiffs' premises and abating the alleged nuisance and also to enjoin them from commencing or prosecuting any proceedings against the plaintiffs on account of the alleged nuisance. There was a demurrer to the bill which was sustained and a decree was entered dismissing the bill. The plaintiffs appealed. Before the hearing on the demurrer the case had been sent to a master on the question of injunction and he had made a report. That report, however, is not before us though reference to it is made in the defendants' brief.

If the allegations of the bill are correct, and on demurrer they must be assumed to be, the case discloses a rather unusual condition of things.

The adjudication that there was a nuisance on the plaintiffs' premises was in the very first part of February, almost in mid-winter. The nuisance, if there was one, consisted, it is alleged, of decayed and partially decayed and rotten vegetable matter, — stumps, roots, bushes, limbs, and perhaps peat and muck. This matter was on land which was then several feet above the lake, and likely to continue so, it is alleged, except for some unusual flow of water. Taking the time of year and the nature and situation of the alleged nuisance into account, it is somewhat difficult to understand how the board of health could have come to the conclusion that there was a nuisance, or how there could have been any danger of pollution to the water supply.

But the board of health has adjudged that a nuisance existed

and has ordered it to be abated by the plaintiffs. And the question is whether they can be restrained either under the general equity powers now vested in the Superior Court or otherwise from entering on the premises and abating the alleged nuisance if the plaintiffs do not abate it as ordered, and from instituting proceedings against the plaintiffs on account of their failure or neglect to comply with the order of abatement. And we are of opinion that they cannot be so restrained. The board of health acted, it is apparent, under Pub. Sts. c. 80, §§ 20, *et seq.*, and not under § 28 of the same chapter. The jurisdiction conferred by these provisions is summary in its nature and the objects to be attained by its exercise would be defeated, in many, if not most cases, if the orders of boards of health were subject to judicial examination and revision at the instance of parties affected by them before they could be carried into effect. *Belcher v. Farrar*, 8 Allen, 325. *Salem v. Eastern Railroad*, 98 Mass. 431. *Taunton v. Taylor*, 116 Mass. 254, 260. *Cambridge v. Munroe*, 126 Mass. 496, 502.

The decision of the board of health is not, however, in such cases final and conclusive to all purposes in regard to the parties interested in the question whether the thing complained of was a nuisance. *Salem v. Eastern Railroad*, *ubi supra*. *Miller v. Horton*, 152 Mass. 540. *People v. Board of Health*, 140 N. Y. 1. *Commonwealth v. Alden*, 143 Mass. 113.

It establishes for the time being that there is a nuisance, and those who act under the orders of the board of health in abating it are protected thereby while engaged in the performance of the duty thus imposed. *Miller v. Horton*, *Salem v. Eastern Railroad*, and *People v. Board of Health*, *ubi supra*.

But they act at their peril if it turns out in subsequent proceedings that there was in fact and in law no nuisance. *Miller v. Horton*, *Salem v. Eastern Railroad*, and *People v. Board of Health*, *ubi supra*.

And the question whether there was a nuisance, or whether, if there was one, it was caused or maintained by the parties charged therewith, may be litigated by such parties in proceedings instituted against them to recover the expenses of the abatement, or may be litigated by the parties whose property has been injured or destroyed in proceedings instituted by them

to recover for such loss or damage, and may also be litigated by parties charged with causing or maintaining the nuisance in proceedings instituted against them for neglect or failure to comply with the orders of the board of health directing them to abate the same. *Miller v. Horton*, *Salem v. Eastern Railroad*, *People v. Board of Health*, and *Commonwealth v. Alden*, *ubi supra*. It follows, we think, from what has been said that the Superior Court had no power under its general equity jurisdiction to inquire into the question whether there was a nuisance and to enjoin the board of health if it should turn out that in the judgment of that court there was none.

The plaintiffs contend that the Superior Court had such power under Pub. Sts. c. 80, § 26. But the power there given is not the power to stay or prevent a prosecution for causing or maintaining a nuisance, nor the power to revise the action of the board of health, but the power to stay or prevent the nuisance "until the matter is decided by a jury or otherwise." This is made plain by a reference to the original statute. See St. 1827, c. 88.

The plaintiffs further contend that in the allegations of the bill the nuisance, if there was one, consisted in the pollution of a water supply and that jurisdiction over such matters is vested under St. 1897, c. 510, exclusively in the State board of health. But we think that there is nothing in that statute which takes away or limits the power of local boards of health to deal with nuisances in their respective jurisdictions. The statute does not in terms provide that the jurisdiction of the State board of health over matters affecting the purity of the sources of water supply shall be exclusive. On the contrary it provides in § 7 that, except as to the repeal of St. 1890, c. 441, the "act shall not be construed to impair or repeal any existing provision of law in regard to the pollution of springs, streams, ponds or water courses, or the prevention of such pollution, or the powers and jurisdiction of any court relating to the prevention of such pollution." Under the general authority which is thus reserved under existing laws to other tribunals we think that it is within the power of local boards of health to examine into nuisances which may be injurious to the health of the inhabitants by affecting the purity of the water supply as well as into other causes of sickness. Pub. Sts. c. 80, § 20. Moreover the method of pro-

cedure provided for the State board of health is entirely different from that of local boards of health, and in the absence of any provision to that effect we should hesitate to hold that it was intended to do away with the prompt and summary remedy afforded by application to local boards of health. Whether the matter might not have been brought in the first instance before the State board of health we need not decide.

If we assume as we are bound to upon the allegations in the bill and the demurrer that the action of the board of health was instigated by the water company, the fact remains that the board has adjudged that a nuisance exists, and the question what influences or motives may have set the board in motion is immaterial. And if it be true as alleged that action was taken with a view to affect proceedings in the suit pending in the Superior Court between the plaintiffs and the water company that also furnishes no ground for interference with the board of health. It often happens that the proceedings in one tribunal are affected or may be affected by action taken by another tribunal. Such action may even be taken with that purpose in view so long as it is within the jurisdiction of the tribunal that acts, and may also be at the instance of one of the parties to the proceedings in the other tribunal.

The order of the board of health of Wakefield cannot apply to a nuisance in the town of Stoneham and must be taken as limited in its scope to the town of Wakefield. The objection, therefore, that it is in excess of their jurisdiction is not well founded.

Decree affirmed.

NATIONAL GRANITE BANK *vs.* THEODORE H. TYNDALE,
administrator.

Norfolk. March 8, 1901. — June 19, 1901.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

Practice, Civil, Election of alternate remedy. *Contract*, Common counts. *Evidence*,
Conclusions of fact, Declarations of deceased persons.

The payee of an indorsed promissory note brought an action against the maker with counts on the note and for money lent and money had and received. While this action was pending he brought an action against the indorser. This court deciding that the note was void but that the payee had a cause of action on the common counts, the payee discontinued his suit against the indorser on the note and proceeded in his suit against the maker on the count for money lent. *Held*, that the plaintiff's concurrent pursuit of his alternate and inconsistent remedies waived neither of them, and that, by suing the indorser on the note while his suit against the maker was pending, he had not elected to rely on the note so as to prevent him from recovering on the common counts when the note was held to be invalid.

In an action by a bank for money lent, the cashier of the plaintiff was asked, what transaction took place between the plaintiff and the defendant, and answered "We on December 29th made a loan to" the defendant, and further stated that he personally attended to the transaction. The answer was objected to on the ground that the witness was permitted to state a conclusion in describing the transaction as a loan, and that whether a loan was made was a question solely for the jury. *Held*, that the answer was the statement of a fact within the personal cognizance of the witness, and properly admitted.

In an action by a bank for money lent upon a note held to be void because made by the defendant to her husband, the defendant died between two trials of the case. At the new trial, the administrator of her estate, then the defendant, offered in evidence the declarations made by his intestate after the action was brought, to the effect that she never borrowed any money of the plaintiff. The declarations were offered under St. 1896, c. 445, as in an action against the administrator of a deceased declarant in which the cause of action was supported by oral testimony of a promise or statement made by the deceased person. *Held*, that the declarations were not admissible under St. 1896, c. 445, because it did not appear that the action was supported by oral testimony of a promise or statement made by the intestate. *Whether*, the declarations were admissible under St. 1898, c. 535, was not considered, because they were not so offered.

CONTRACT, with counts upon three promissory notes and for money lent and money had and received, as stated in the opinion of the court. Writ dated July 17, 1896.

The third trial of this case in the Superior Court was before *Bishop, J.* The plaintiff had a verdict in the sum of \$16,912;

and the defendant alleged exceptions, of which four were argued. The first and second are described in the opinion of the court. The third and fourth were as follows.

One Claflin, the cashier of the plaintiff, was the only witness for the plaintiff. His testimony, which was the subject of the third exception argued, was as follows :

“ Q. You may proceed now. I ask you what was the transaction? A. We on December 29th made a loan to Mrs. Isabella S. Whicher. — Q. What amount? A. Of \$15,000. — Q. Did you personally attend to it? A. I did. — Q. What did you do yourself in reference to it? A. I gave Mrs. Isabella S. Whicher a check, or cashier’s check of \$15,000, payable to her order.”

The defendant excepted to the answer containing the statement that the bank made a loan to Mrs. Whicher, on the ground, that permitting the witness to characterize the transaction as a loan was erroneous ; that the question whether a loan was made was a conclusion, and was solely for the jury.

The ground of the fourth exception argued was the exclusion of evidence of declarations made by Mrs. Whicher, the original defendant and the intestate of the present defendant, the administrator of her estate.

The defendant offered evidence of the declarations of Mrs. Whicher, all made after this action was brought, and some after the plaintiff’s contention at the first trial that a loan had been made to her, as follows: “ That upon being informed by her junior counsel that it was apparent that the bank was endeavoring to make a sort of two-headed affair of it, if they could not prove that she was liable upon the notes, that they were then to endeavor to show that she had borrowed money to the amount of \$15,000, she replied, ‘ Why, of course they cannot say anything of that sort, for I never borrowed any money of the bank.’ That upon Mr. King, the president of the bank, testifying at the former trial to the fact of a loan made to her through Louis E. Whicher, she said to her counsel, ‘ Why, that can’t be so, for such an idea never entered my head. Louis asked me if I would sign some notes as a mere matter of form, and told me that I would never hear of it again. When I went into the office on that day I sat at the table and he laid before me on the table some papers and said, “ Write your name there, Aunt Isabella,” and I did so,

and I never heard of the matter again after I signed my name in the office that day until Mr. King came to the house.' That to another witness she said, 'I never had any money. I never borrowed any money from the Granite Bank.' That when she signed these papers she had no idea that any loan was being made with her. That she said in substance that Louis E. Whicher had no authority from her to procure any loan for her. To another witness, that she was nonplussed that the bank claimed that they had made her any loan. That she repeatedly said she never went near the bank; that she never in any way, form, shape or manner borrowed any money, or, what they were pleased to term, a loan. She spoke to one of Mr. King as having deliberately lied upon the stand, and said to another that Mr. Clafin and Mr. King both lied in the matter of their testimony to the court."

The foregoing evidence was offered under St. 1896, c. 445, as in an action against the administrator of the deceased declarant in which the cause of action was supported by oral testimony of a promise or statement made by the deceased person. The evidence was excluded by the judge, and the defendant excepted.

The defendant introduced the testimony of Mrs. Whicher given at the first trial of this action in which she denied having ever stated that she had borrowed \$15,000 from the Granite Bank and lent it to T. A. Whicher and Company, and testified that nothing was said at any of the interviews about a loan by her at the Granite Bank or to her at the Granite Bank; that she had never made any application to the Granite Bank for a loan, that the Granite Bank had never approached her at any time to lend her any money, and that she had never authorized or directed any one to raise a loan for her at the Granite Bank.

S. H. Tyng, for the defendant.

R. M. Morse & C. H. Hanson, for the plaintiff.

MORTON, J. This is an action of contract to recover the sum of \$15,000. The declaration contains counts upon three notes of \$5,000 each, and also counts for money lent and money had and received. The case has been twice before this court. The first time it was held that the notes were void because made payable by the defendant's intestate to the order of her hus-

band and the defendant's exceptions were sustained. *National Granite Bank v. Whicher*, 173 Mass. 517. At the second trial upon an offer to show that the money was lent to the defendant's intestate the court ruled that the plaintiff could not recover upon the common counts for money lent or money had and received and the plaintiff's exceptions were sustained. 176 Mass. 547. The case has now been tried a third time, — the plaintiff relying wholly upon the count for money lent. There was a verdict for the plaintiff and the case is here upon the defendant's exceptions to the admission and exclusion of certain evidence, to the refusal of the presiding judge to give certain rulings and to certain rulings or instructions that were given.

We take up the exceptions in the order in which the defendant has argued them on his brief. The first relates to the record of a suit which was brought by the plaintiff against Thomas A. Whicher, one of the indorsers of the notes, in March, 1898, and which was discontinued in October, 1900. The second relates to an agreement made in November, 1898, between the plaintiff and Louis E. Whicher, another indorser, in which the plaintiff agreed not to sue him upon the notes, though "reserving . . . all rights against . . . other parties on said notes," in consideration of Whicher's agreement to pay on or before January 1, 1894, any amount remaining unpaid on the notes, not exceeding \$3,750. These were offered by the defendant and admitted by the court *de bene*. The exceptions do not state for what purpose they were offered. At the close of the evidence the court excluded them and ruled "that neither the bringing of said action nor the making of said agreement was such an election to treat the notes in suit as valid as would prevent the plaintiff from maintaining this action." The defendant excepted to the exclusion of the record and agreement, and to this ruling. There is nothing in the exceptions to show that either at the time of the ruling or at any other time in the course of the trial the defendant claimed that the record and agreement were admissible for any other purpose than to show an election on the part of the plaintiff to treat the notes as valid. The court evidently understood that that was the purpose for which they were offered and ruled accordingly. If the defendant

relied on any other ground of admissibility he should have then called the attention of the court to it; not having done so he is confined to their competency on the question of election. We think that the ruling of the court was right. The present action was brought nearly two years before the suit against Thomas A. Whicher was instituted and was pending when the writ was sued out in that case. The declaration contained counts on the notes and also counts for money lent and money had and received. At the time therefore when the plaintiff brought its action against Thomas A. Whicher as indorser it was pursuing in this action its remedies against the defendant as maker of the notes and on the common counts for money had and received and money lent, and it has continued to pursue and is now pursuing the remedies to which it was and is entitled in this action. It is difficult, therefore, to perceive how by bringing the action against Thomas A. Whicher as indorser the plaintiff has manifested its determination to rely upon the notes. At the time when it brought that action it was relying on its right to recover for money lent as well as on the notes, and as the court says in *Whiteside v. Brawley*, 152 Mass. 133, in such a case "as the plaintiff takes both positions he cannot be said to have elected." The situation disclosed by the evidence is the case of a party pursuing concurrently all of its remedies until the court decides which remedy it is entitled to and until it obtains satisfaction and not a case of election. If the plaintiff had discontinued the present action after bringing suit against Thomas Whicher, and after it knew that the defendant's intestate denied her liability, it is possible that it might be held to have elected to rely upon the notes. *Terry v. Munger*, 121 N. Y. 126. But it did not do that. On the contrary after the decision of this court in this action that the notes were invalid, it discontinued the action against Thomas, and pursued its remedy on the count for money lent which had always been a part of the declaration.

The agreement with Louis E. Whicher stands no better, we think, than the record of the action against Thomas, and was rightly excluded for like reasons. Taken in connection with this suit which was then pending against the maker of the notes, and with the suit that was brought against Thomas, it manifests

not a choice of remedies nor an intention to rely upon the notes to the exclusion of other remedies, but a purpose on the part of the plaintiff to avail itself of all its rights and remedies.

The next exception is to allowing the plaintiff's cashier to testify in answer to the questions, "Did the bank in December, 1891, have any business transaction with Mrs. Whicher?" and "what was the transaction?" "We on December 29 made a loan to Mrs. Isabella S. Whicher." We see no error in the admission of the testimony. The answer was the statement of a fact within the personal cognizance of the witness.

The last exception which the defendant has argued relates to the exclusion of evidence which was offered of declarations made by Mrs. Whicher, the defendant's intestate. These were offered under St. 1896, c. 445, which provides that "In the trial of an action against an executor or against an administrator of a deceased person in which the cause of action is supported by oral testimony of a promise or statement made by said deceased person, evidence of statements written or oral made by said deceased person . . . tending to disprove or show the improbability of such statement or promise having been made, shall be admissible." Evidence was subsequently admitted of what Mrs. Whicher testified to at the last trial and it may be doubted whether if the evidence that was offered and excluded had been admissible, the defendant was harmed by its exclusion. But we think that it was rightly excluded. The evidence was admissible only in case the cause of action was supported by oral testimony of a promise or statement made by Mrs. Whicher. There was no such testimony and therefore the statements made by her were inadmissible. Whether it was admissible under St. 1898, c. 535, we need not consider. It was not so offered.

The defendant has not argued any of the other exceptions that were taken and we treat them as waived, except so far as included in the matters that have already been considered. We see no error in the instructions that were given, or in the refusal or omission to instruct as requested.

Exceptions overruled.

SUSIE C. BACON & others vs. AUGUSTA E. SANDBERG
& another.

Middlesex. March 12, 1901. — June 19, 1901.

Present: HOLMES, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Easement, Equitable restriction. Equity Pleading and Practice, Laches.

Where an owner divides a tract of land into building lots and as part of a general scheme for its improvement inserts in the deeds of sale restrictions as to the purposes for which the land may be used, if it sufficiently appears that the intent of the grantor was to benefit the lot owners generally, it is not necessary, in order that the restrictions should be enforceable, that they should be exactly the same in all the deeds, if the differences are not substantial. Also, the fact that two of the lots, one sold before the plan was made, and the other a very small one, were sold without restrictions is not inconsistent with a general scheme of the grantor imposing restrictions on the remaining lots.

In a suit to enforce an equitable restriction in the deed of the defendant, as to the place and manner in which he might build upon his lot, it appeared, that the defendant obtained a permit to build on May 9, and that the building was finished about June 10 or 12, that on May 17 a petition was circulated to stop the work and presented to the mayor of the city, that about May 20 one of the plaintiffs had a conversation with the defendant and objected to the building on the ground of restrictions, that on May 27 and June 1 letters complaining of the building were written to the defendant, that on June 5 or 6 the plaintiffs' attorney had an interview with the defendant in which the defendant said he would let the plaintiffs know in a short time whether he would remove the building or not, that the building was not removed, and on June 14 the bill was filed. Held, that there was nothing in these facts to show unreasonable delay on the part of the plaintiffs in bringing their bill, or anything showing either actual consent or passive acquiescence on their part, and that the defence of laches was wholly unsupported.

It appears to be settled in this Commonwealth, that a plaintiff is not prevented from enforcing in equity a building restriction by the fact that he has not objected to a violation of the restriction by some one in the neighborhood other than the defendant. But, when the plaintiff has violated the restriction himself, the question whether he is entitled to relief depends largely on whether the plaintiffs' breach of the restriction was so material and substantial as to enable the court to say that it ought not to interfere in his behalf.

In a suit to enforce an equitable restriction in the deed of the defendant, that no building or structure should be placed within thirteen feet of a certain street, it appeared, that the defendant had put up a one story building the whole of which was within the prohibited thirteen feet, and that the plaintiffs had violated the same restriction in their own deeds by projecting from their respective houses bay windows, piazzas and steps into the restricted space. Held, that, although the plaintiffs could not invoke the aid of a court of equity to prevent the defend-

ant from erecting a piazza, bay window or steps extending into the restricted space, the building of a separate house in this space was something which they had not done, and they were entitled to a decree ordering the defendant to remove the structure thus erected by him.

LATHROP, J. This is a bill in equity, filed June 14, 1898, in the Superior Court, to enforce certain restrictions contained in a deed to one Rundstrom, whose title the defendant Sandberg has. The last named defendant is a tenant of Sandberg.

The facts are as follows: In 1887, one Clark, as trustee, who was the owner of a large tract of land in Everett on one side of Main Street, caused it to be divided into lots, with streets running through it, and filed a plan of the same in the registry of deeds. Between 1887 and 1894, Clark sold all of these lots, and has no land remaining in the vicinity. The lot now owned by Sandberg was conveyed subject to four restrictions: 1. "That no building or structure of any kind shall be placed on the premises at any time within thirty years after the date of this deed within thirteen feet of Beacon Street." 2. "That no house shall be built on said granted premises which shall be less than two stories in height exclusive of cellar and attic, or which shall cost less than \$2,000." 3. "That no building and no part of the same on said granted premises shall be used for manufacturing or mechanical purposes or occupations." 4. "That no livery stable or pig pen, and no offensive structure of any kind shall be built or maintained on said granted premises, but a private stable for the horses of the occupants of said granted premises may be placed on the rear part thereof, no portion of such stable to be less than fifty feet south of the southerly line of said Beacon Street or less than sixty feet east of the easterly line of said Main Street."

The defendant Sandberg put up a one story building on the lot conveyed to her, all of which is within thirteen feet of Beacon Street, and which is occupied as an office by the last named defendant, who is a real estate dealer, an insurance agent, a carpenter and a plumber. In the Superior Court the plaintiffs obtained a decree ordering the defendants to remove this structure; and the defendants appealed.

1. The first defence set up is that as the common grantor sold out all her interest in the lots, the plaintiffs cannot maintain this

bill unless there was a general scheme for the improvement of the property, and the restrictions were uniform.

While it has been often held that where an owner divides a tract of land into building lots, and, as a part of a general scheme for its improvement, inserts in the deeds of sale of all the several lots, uniform restrictions as to the purposes for which the land may be used, such provisions inure to the benefit of the several grantees, who may enforce them in equity, yet the criterion in this class of cases is the intent of the grantor in imposing the restrictions, whether they are intended for his personal benefit, or for the benefit of the lot owners generally; and his intention is to be gathered from his acts and the attendant circumstances. If this sufficiently appears, the fact that as to some lots there are no restrictions simply takes those lots out of the general scheme; and it is not necessary that the restrictions should be exactly the same in all the deeds. *Hano v. Bigelow*, 155 Mass. 341. *Hills v. Metzenroth*, 173 Mass. 423.

In the case at bar it appears that two lots, Nos. 1 and 2, were sold without restrictions. It however appears that Lot 1 was sold before Beacon Street was laid out or the plan made; and the lot is on Main Street, and not on Beacon Street. Lot 2 ran back only twenty-two feet from Beacon Street, and would have been useless if restrictions had been placed upon it. The other lots are seventy-five feet deep from Beacon Street. We cannot regard the fact that these two lots were sold without restrictions as inconsistent with the general scheme of the grantor. See *Hano v. Bigelow*, 155 Mass. 341, 343, where also two lots were sold without restrictions.

Then it is urged that the restrictions on the other lots differ from those imposed on the lot in question. The facts are that as to a large number of lots the restrictions are the same as on this lot, except that in the third restriction, the words "trade or manufacture" are substituted for "manufacturing or mechanical purposes." Bucknam Street bounds all the lots on the east, and there is a restriction as to the lots bounding on that street, requiring the houses to be built thereon to be set back thirteen feet. There are two lots bounding on Beacon Street and Bucknam Street. The deed of one lot mentions a stable and that of the other does not. But these differences are not essential, if

enough appears to show the general intent of the grantor. The justice of the Superior Court found on the evidence in favor of the plaintiff; and we see no reason to doubt the correctness of his finding. *Hano v. Bigelow, ubi supra.*

2. The next defence is that the plaintiffs were guilty of laches. The defendants obtained a permit to build on May 9. The evidence does not show clearly when the building was begun, but it was finished about the tenth or twelfth of June. On May 17, a petition was circulated to stop the work, which was presented to the mayor of Everett, and denied. About May 20, one of the plaintiffs had a conversation with the last named defendant, and objected to the building on the ground of the restrictions. On May 27, letters were written to the last named defendant and to the husband of the first named defendant, and on June 1, to both the defendants, all complaining of the building. On June 5 or 6, an interview was had by the plaintiffs' attorney with Sandberg; and on this occasion she said she would let the plaintiffs know in a short time whether she would remove the building or not. She did not do so, and on June 14 the bill was filed.

We see nothing in these facts to show any unreasonable delay on the part of the plaintiffs in bringing this bill, or anything showing either actual consent or passive acquiescence on their part. *Linzee v. Mixer*, 101 Mass. 512, 527, 528. *Attorney General v. Algonquin Club*, 153 Mass. 447, 453. *Harrington v. McCarthy*, 169 Mass. 492.

3. Lastly, it is urged in defence, that the plaintiffs cannot come into a court of equity for redress, because they have infringed the restrictions, by allowing projections from their houses into the space of thirteen feet between the houses and the line of Beacon Street. These projections consist of bay windows, piazzas and steps.

It appears to be settled in this Commonwealth that a plaintiff is not prevented from obtaining relief by the fact that he has not objected to a violation of a restriction by some one in the neighborhood other than the defendant. *Linzee v. Mixer*, 101 Mass. 512, 531. *Payson v. Burnham*, 141 Mass. 547, 556. See also *Knight v. Simmonds*, [1896] 2 Ch. 294; *German v. Chapman*, 7 Ch. D. 271, 278.

When a breach of a restriction or of a covenant has been committed by the plaintiff, the case stands somewhat differently. Whether a court of equity will or will not aid the plaintiff in such a case depends largely upon the question whether there has been such a material and substantial breach as will enable the court to say that it ought not to interfere. Kerr on Inj. (3d ed.) 431. *Western v. MacDermot*, L. R. 1 Eq. 499; and L. R. 2 Ch. 72. *Jackson v. Winniffrith*, 47 L. T. (N. S.) 243. *Chitty v. Bray*, 48 L. T. (N. S.) 860.

In the case before us it may be assumed that the plaintiffs, by their conduct in respect to their own houses, could not invoke the aid of a court of equity to prevent the defendants from erecting a piazza, bay window or steps extending into the restricted space; but the building of a separate house in this space is something the plaintiffs have not done, and as this building violates the first restriction, we see no reason why the plaintiffs should not be allowed to enforce their rights in equity, without considering whether the defendants have not also violated some of the other restrictions. *Evans v. Mary A. Riddle Co.* 43 Atl. Rep. 894.

Decree affirmed.

T. Weston, Jr., for the defendants.

A. P. Carter, for the plaintiffs.

CHARLES A. HALL vs. JAMES J. GRACE.

Suffolk. March 15, 1901. — June 19, 1901.

Present: HOLMES, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Agency, Broker's commission. Evidence, Materiality, Res inter alios.

A real estate broker can recover a commission for services in effecting an exchange of lands, if he can show that he was the effective means of bringing about the exchange, although the transaction was completed through another broker and the bargain was modified in unessential terms.

In an action by a real estate broker to recover a commission for services in effecting an exchange of lands which was finally completed by other brokers, a letter from one of these other brokers to another of them, offered by the defendant as "a part of the history of the transaction which culminated in the sale," may be excluded as immaterial besides being *res inter alios*.

In an action by a real estate broker to recover a commission for services in effecting an exchange of lands, finally completed by other brokers and with certain changes in the bargain which the plaintiff contended were unessential details, it is proper to exclude evidence, offered by the defendant, as to the particular steps taken and the trouble experienced by the other brokers in carrying out the new features of the modified bargain, with which the plaintiff did not pretend to have anything to do and which he contended were not essential parts of the transaction; even if under any circumstances it would be pertinent, whether the plaintiff could have done the things which were done by the other brokers, and if the trouble of others would have been a criterion of what the plaintiff could have done.

CONTRACT to recover a commission for services as a real estate broker in effecting an exchange of certain lands of the defendant, situated in that part of Boston called Brighton, for the real estate known as the Hotel Langham, in Boston. Writ dated September 22, 1898.

At the trial in the Superior Court, before *Lawton, J.*, it appeared, that the exchange was made in the summer of 1897, and that the Hotel Langham was then owned by George W. Morse, John W. Weeks and Jonathan D. Lane, as trustees of the Newton Land and Improvement Company. The plaintiff claimed a commission, as a real estate broker, for effecting this exchange. The defendant paid a commission for effecting the exchange to other real estate brokers, Whitcomb, Wead and Company, E. H. Eldredge and Company, and Pierce J. Grace, who acted jointly in the matter, and contended that these latter brokers were entitled to the commission, and that the plaintiff was not. The plaintiff did not contend that he had an exclusive right to act for the defendant, and stated that he knew that other brokers could have acted for the defendant if they desired. The evidence so far as necessary to an understanding of the exceptions is stated in the opinion of the court.

At the close of the evidence, the defendant asked the judge to rule, that the plaintiff upon all the evidence was not entitled to recover as a matter of law. The judge refused to make this ruling, and, after instructions from the judge, to which no exception was taken, the jury returned a verdict for the plaintiff in the sum of \$7,215.62; and the defendant alleged exceptions to the refusal of the judge to rule as requested and to the exclusion of certain evidence which is described in the opinion of the court.

J. P. Leahy, (J. C. Pelletier with him,) for the defendant.

H. P. Harriman & H. E. Perkins, for the plaintiff.

HOLMES, C. J. This is an action by a broker to recover a commission for an exchange of lands. Other brokers were employed by the defendant and have been paid. But as unfortunately there is no process analogous to interpleader by which persons setting up mutually exclusive claims in contract can be brought together in one proceeding, the plaintiff had a right to make out, if he could, that he was the effective cause of the bargain. The chief question raised by the exceptions is whether there was any evidence which warranted the jury in giving him a verdict.

The plaintiff had talked with the defendant in 1896 as to the sale or exchange of the defendant's lands in Brighton, and had been referred by him to his son. As the defendant denied that the plaintiff was his broker, the plaintiff was allowed to prove that he submitted a series of offers to the son, ending with one of the Hotel Langham, which was the property finally exchanged. This belonged at the time to one Williams, but while the plaintiff was at work was sold by Williams to Morse, Lane and Weeks, trustees of a land company, on July 29, 1897. According to the plaintiff's story, he went on, and the day after the sale spoke of the matter to Morse. The exchange finally was made with these trustees.

The admission of the previous offers was excepted to. But the evidence showed that the plaintiff was continuously assuming to deal with the defendant's land as a broker to obtain a sale or exchange, up to and after the time when he brought the Langham Hotel to the defendant's notice. It showed also that the plaintiff's assumption was accepted by the defendant's son, to whom the defendant had referred the plaintiff as his representative. (The agency of the son was denied, but the jury were warranted in finding it established by the evidence.) It therefore tended to establish the first point in the plaintiff's case, that he was not a stranger to the defendant but was free to act for him in the matter and to earn a commission in the event of his meeting with success.

The rest of the plaintiff's case is easy so far as we are concerned. The strong points for the defence in this court are

that another broker talked with Weeks, one of the trustees, on July 29, whereas the plaintiff does not put his conversation with Morse, the other active trustee, before July 30, that the other brokers carried through the bargain, and that the agreement finally made was substantially different from anything that the plaintiff had to do with.

As to the first of these points, apart from the technical answer that the jury were not bound to believe the defendant's evidence concerning the interview of July 29, and assuming, as we hardly could assume for the purpose of sustaining exceptions, that this evidence was undisputed, still the jury might have found not only that the exchange was suggested by the plaintiff before the sale by Williams, but that all parties regarded the land rather than the owners for the time being as the important feature, and that after that sale they continued the negotiations for the exchange without a break other than the transfer of their offers from Williams to the trustees. They might have found, in other words, that the question who first made the suggestion of the exchange to the trustees was a comparatively unimportant element in the larger question which the jury had to decide. It might be argued also perhaps that Morse seemed to be the active trustee, and that the dealings with him were the only important ones. We have nothing to do with probabilities, which the defendant's counsel could not refrain from arguing, and express no opinion about them.

As to the remaining points of the defence it is admitted that the bargain as it finally went through on August 11 was somewhat different from that which was expressed in a letter from the plaintiff to Morse on August 4, which, according to the plaintiff's testimony, seemingly was shown to the defendant beforehand and afterwards was reported to the defendant's son. These differences were expressed in a counter offer by Morse on August 9, which was accepted in substance. The most striking one consisted in requiring \$70,000 to be raised by a mortgage of the Brighton lands before they should be conveyed to the trustees, the sum when raised to be handed over to them. It is admitted also that the later work upon these new details was done by other brokers, and that the contract was carried through by them. But it seems to us that on the facts which we have

stated the plaintiff had a right to argue that he suggested the transaction and did so much in the way of bringing the defendant into relations with the Langham Hotel that he really was the effective cause of an arrangement being made, and that he also was entitled to ask the jury to find that the later modifications were only matters of detail and did not make the transaction carried through so different from the one which he had set on foot as to be substantially new.

An exception was taken to the exclusion of a letter from Wead, one of the brokers paid by the defendant, to another, Eldredge. It was offered merely as "a part of the history of the transaction which culminated in the sale." So far as appears, it was immaterial in every respect, as well as *res inter alios*.

The only other exception was to the exclusion of evidence of the particular steps taken and trouble experienced by the other brokers in raising the \$70,000 by mortgage according to the modified bargain. The plaintiff did not pretend that he had anything to do with that, and accepted the burden of convincing the jury that the difference did not go to the essence of the exchange. Therefore it did not matter what trouble it cost the other brokers even if under any circumstances it would be pertinent to speculate whether the plaintiff could have raised the money, or if the trouble of others would have been a criterion of what the plaintiff could have done.

Exceptions overruled.

PETER W. FRENCH vs. BOSTON NATIONAL BANK.

Suffolk. March 19, 1901. — June 19, 1901.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

Equity Jurisdiction, Specific performance. Contract, Construction, Consideration. Frauds, Statute of, Part payment, Acceptance and receipt. Insolvency.

The plaintiff had transferred certain stocks to the defendant, a bank, as security for his note for \$5,000. Thereafter the plaintiff was adjudged an insolvent. The defendant on its own petition was ordered by the Court of Insolvency to sell the

securities and apply the proceeds upon the note. Thereupon the plaintiff and defendant made an oral agreement, that the plaintiff should procure some one to purchase certain of the securities for \$1,000, which sum when paid should be credited upon the note, that the defendant should bid in the remaining securities for \$2,700 in all if no higher bid was made for them and the amount of the bids should be indorsed upon the note, that the defendant should hold and carry the securities thus bid in, and, upon receiving from the plaintiff the amount of its bids with interest, and the balance of the \$5,000 of the note with interest, should convey the securities to the plaintiff. In pursuance of this agreement the plaintiff procured a purchaser who paid \$1,000 for the securities to be sold for that sum, and the defendant delivered those securities and indorsed the payment on the note and on the same day bid in at auction the remaining securities for \$2,700 and indorsed that amount on the note. The defendant proved for the balance of its claim in insolvency and received a dividend. The plaintiff received his discharge. In a bill for a specific enforcement of this contract, by ordering the defendant to deliver the securities to the plaintiff on his paying to the defendant the balance of his indebtedness, it was *held*, that the contract was entire, embodying a single scheme, each part having reference to the others, by which the plaintiff might save his collateral; that, assuming the contract to be within the statute of frauds, the statute was satisfied by the payment of the \$1,000 by the purchaser procured by the plaintiff and the acceptance and receipt by him of the securities thereby purchased; that the plaintiff's agreeing to procure and procuring such purchaser could be found to be a good consideration for the promise of the defendant; and that the contract was one which the court would specifically enforce in spite of there being no mutuality of remedy when the contract was made, as the plaintiff must perform his part of the contract by tendering the balance of his indebtedness before the time for performance by the defendant could arise.

A part payment made by a purchaser procured by one of the parties to an oral contract of sale in accordance with the terms of the contract satisfies the statute of frauds as much as if made by one of the parties to the contract. So also of an acceptance and receipt of part of the goods by such purchaser.

The assent of an assignee in insolvency to the maintenance of a suit by the insolvent after his discharge, to enforce a contract to deliver to him certain securities, is sufficiently shown by the assignee acting as counsel for the plaintiff.

BILL IN EQUITY to compel the delivery to the plaintiff of certain certificates of stock on payment by the plaintiff to the defendant of a certain sum of money in accordance with an oral agreement between the parties, amended from an action of contract claiming damages for the defendant's failure to deliver the securities. Writ in action at law dated January 18, 1897, amendment allowed and bill in equity filed March 15, 1898.

In the Superior Court the case was heard by *Bell, J.*, who ordered a decree to be entered for the plaintiff in accordance with a master's report, and allowed exceptions alleged by the defendant. The defendant also appealed from the decree. The case is fully stated in the opinion of the court.

F. E. Snow & W. B. French, for the defendant.

E. W. Hutchins & S. L. Whipple, for the plaintiff.

HOLMES, C. J. This is a bill in equity brought to obtain the delivery of certificates of indebtedness issued by the receiver of the Lebanon Springs Railroad Company for \$5,000, and of certificates for seven hundred and ninety-nine shares of the preferred stock and two hundred and thirty-eight shares of the common stock of the United Shoe Machinery Company, on the ground of the transactions which we shall state. In the Superior Court a decree was entered for the plaintiff upon a master's report, and the case is here by appeal and also on exceptions to the refusal of rulings asked on behalf of the defendant. The exceptions are not material as such, the question before us being the general one whether the master's report warrants the decree.

The receiver's certificates and stock now represented by the certificates of stock just mentioned were transferred by the plaintiff to the defendant as security for a note for \$5,000, dated December 10, 1892, but if the plaintiff's view of the case is right the amount remaining to be paid upon the note has been more than paid by the dividends and interest received by the defendant from the securities.

On February 9, 1893, the plaintiff was adjudged an insolvent, and on July 19, the defendant, upon its own petition, was ordered by the Court of Insolvency to sell the securities and to apply the proceeds upon the note. It went through the form of a sale on September 6, credited the proceeds, proved for the balance remaining due, and received a dividend. On September 20, 1893, the plaintiff received his discharge.

In August, before the sale, the plaintiff and defendant made an oral agreement reported by the master in the following words: "The plaintiff was to procure some one to buy the 25 shares of National Tube Works stock for one thousand dollars (\$1,000), which sum when paid was to be credited upon the said five thousand dollar (\$5,000) note. The defendant was to bid in at the auction sale the receiver's certificates for one thousand dollars (\$1,000), and the 1,701 shares of McKay & Copeland stock for seventeen hundred dollars (\$1,700), if no higher bid for either was made at the auction, and the amount of said bids

was to be indorsed upon said note. The defendant was to hold and carry said certificates and stock, and upon receiving from the plaintiff the amount of said bids with interest, and the balance of said five thousand dollar (\$5,000) note with interest, was to convey said certificates and stock to the plaintiff."

"On September 6, 1893, the plaintiff, in pursuance of said agreement, procured one Plummer to buy said National Tube Works stock, who paid defendant one thousand dollars (\$1,000) therefor and received the stock from the defendant, who indorsed the one thousand dollars (\$1,000) upon said note. On the same day the defendant, in pursuance of said agreement, bid in at auction the said certificates and McKay & Copeland stock for twenty-seven hundred dollars (\$2,700), and indorsed said amount upon the note." The money stated to have been paid by Plummer in the passage just quoted from the master's report is shown by another passage actually to have been handed to the defendant by the plaintiff, the money having been furnished to him by Plummer, who was his friend. At the same time the plaintiff received the National Tube Works stock on Plummer's behalf.

We are of opinion that the agreement found by the master is an entire and binding contract which may be specifically enforced. In the first place it is an entire contract. It is not like the purchase of a number of articles in a shop where the only unity is that of time, although such a contract as that might be regarded as entire so far as the statute of frauds is concerned. *Baldehy v. Parker*, 2 B. & C. 87. *Elliott v. Thomas*, 3 M. & W. 170. It embodies a single scheme, each part having reference to the others, by which the plaintiff might save his collateral. This being so, and assuming for the purposes of decision that the contract is within the statute of frauds, Pub. Sts. c. 78, § 5, the statute was satisfied by the payment of the thousand dollars and the acceptance and receipt of the Tube Works stock by the purchaser furnished by the plaintiff under his agreement. See *Dean v. Tallman*, 105 Mass. 443. It is unnecessary to consider whether the furnishing of a purchaser by French would not have been enough. Compare *Boardman v. Cutter*, 128 Mass. 388, with *Weir v. Hudnut*, 115 Ind. 525. Benj. Sales, (4th ed.) 175, (7th Am. ed.) 177.

It is denied that there was any consideration for the defendant's undertaking. We quite agree that reliance upon a promise gives it no new validity when such reliance is not the conventional inducement of the promise, that is to say, when it is not contemplated by the terms of the bargain as the equivalent of the promise. *Martin v. Meles*, ante, 114. *Bragg v. Danielson*, 141 Mass. 195, 196. *Manter v. Churchill*, 127 Mass. 31. *Boyd v. Freize*, 5 Gray, 553, 555. This may have been the ground for the decision in *Boardman v. Cutter*, 128 Mass. 388. We agree on this ground that it would be hard to extract a consideration from the fact that the plaintiff dropped other negotiations which he had begun with a view to saving his security. But the plaintiff's agreeing to procure and procuring a purchaser of the Tube Works stock is stated in a form which naturally conveys the notion that it was the equivalent on his side for what the defendant was to do on the other. One may surmise that it was as likely to be regarded as part of a plan benevolently intended as a favor to the plaintiff throughout rather than as a consideration. But as was remarked in the recent decision of *Martin v. Meles*, *ubi supra*, courts have been astute to discover a consideration in such counter undertakings, for the purpose of upholding business transactions seriously entered into, and when made intended to bind. Certainly we cannot say that the plaintiff's promise or performance might not have been a consideration, or that the master and the judge of the Superior Court, who had the evidence as well as the report before him, were not warranted in finding it to have been so.

What we have said last suggests a difficulty which we should feel in reversing the decree. The master reported the evidence as well as his findings of fact. The evidence is not before us but was before the judge of the Superior Court. It would be hard to say that the decree might not have been warranted by what the judge found even if not by the master's report. But we have preferred to discuss the case on the footing that the decree was founded on the master's report alone.

The final objection to specific performance that when the agreement was made there was no mutuality of remedy is disposed of by *Howe v. Watson*, ante, 30, decided since this case was argued.

The plaintiff prevails upon the footing of a new contract made with him after the insolvency, and therefore the assent of the assignee to the maintaining of this suit is unnecessary. It is sufficiently shown, however, by his acting as counsel for the plaintiff.

As what we have said is enough to dispose of the case, we do not consider it from the other points of view from which it was presented in argument.

Exceptions overruled; decree affirmed.

JOHN C. CLARK vs. CITY OF BOSTON.

Suffolk. March 20, 1901. — June 19, 1901.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

Civil Service Act. Veteran. Contract, Validity. Evidence, Extrinsic to vary writings.

St. 1896, c. 517, § 5, forbidding the removal or suspension except after hearing of any "veteran holding an office or employment in the public service of any city or town," does not apply to a veteran, certified by the civil service commissioners for employment as a plumber, who is employed by the chief of the repair division of the public buildings department of a city to do plumbing by the job from time to time when plumbing work is needed.

If one signs a lawful contract in the absence of fraud, duress or imposition he is bound, whatever his voluntary ignorance or involuntary misinterpretation of its words.

CONTRACT, alleging, that the plaintiff was a veteran employed by the city of Boston under St. 1896, c. 517 as a plumber and that thereafter the defendant unlawfully ceased and refused so to employ him. Writ dated October 14, 1899.

At the trial in the Superior Court, before *Hardy, J.*, without a jury, there was evidence that the plaintiff was a veteran of the war of the rebellion; that he was registered in the office of the civil service commissioners at the State House as a plumber; that the repair division of the public buildings department of the city of Boston on or before March 8, 1898, made a requisition on the civil service commission for plumbers in accordance

with their practice; that the plaintiff was duly certified to that division as a plumber and reported at the office of the repair division to one Logue, chief of the division, for work on March 3, 1898, and was told to report for work by Logue on the following day; that he reported for work March 4, and was told by some one connected with the department, that it would be necessary for him to sign the book before he began work; that he went into the office and signed the book or register which contained the following printed statement or agreement, printed in large type:

"To the Chief of the Repairs Division of the Public Buildings Department: As an applicant for employment under your division I hereby signify my acceptance of such employment on the distinct understanding that I do not become a permanent employee of the city, and that I am liable to be suspended or discharged at any time when the amount of work to be done, or the appropriation therefor, does not permit the continuance of the full force, as well as for any other reason which you may deem sufficient. I also accept with the understanding that when a reduction is to be made in the force employed you have full discretion as to who shall be kept at work and who shall be suspended or discharged, and that no such action on your part is to give me any ground for complaint or for any claim of discrimination against me.

"I accept employment upon the representation that I am a first-class workman in my trade and that I am to be employed on probation during such time as you may require for proof of my skill in my trade, and my fitness in all respects for employment under your division."

There was evidence, that the plaintiff was a man of ordinary intelligence, who could read and write and had some little property. The plaintiff testified, that he did not know what the statement or agreement which he signed was, and that he did not intend to waive any of his rights.

It appeared, that the plaintiff was furnished work as a plumber at various times from March 4, 1898, to September 1, 1899, and was paid for all the work that he did. The plaintiff testified, that non-veterans had been furnished employment when he, a veteran, was not kept at work; and that one Mullen, who

was not a veteran, was furnished work when he, the plaintiff, was not actually employed.

The chief of the repair division of the public buildings department testified, that the practice in the repair division was to assign any plumber who was unemployed to any job which came in; that in case a veteran completed the job on which he was at work, and a man who was not a veteran was employed on a job, the non-veteran's employment was not interfered with and he might be employed several days when there was no work for the veteran.

This was all the material evidence. At the request of the defendant, the judge found: 1. That the plaintiff never held an office or employment in the city of Boston, within the meaning of St. 1896, c. 517, § 5. 2. That the plaintiff signed the agreement printed above. The judge also found that the plaintiff signed the agreement without duress or fraud imposed upon him by the defendant or its agent.

The judge, also at the request of the defendant, made the following rulings: 1. Upon all the evidence in the case the finding must be for the defendant. 2. The plaintiff, having waived his rights under the provisions of St. 1896, c. 517, cannot recover in this action. He found and ordered judgment for the defendant; and the plaintiff alleged exceptions.

F. J. Horgan, for the plaintiff.

S. M. Child, for the defendant.

HOLMES, C. J. The plaintiff is a veteran who, we assume, has worked as a plumber in the repairs division of the public buildings department of the city of Boston. He brings this action for a failure to employ him, when there was work to do, in preference to another man not a veteran, to whom work was given. The right of action is supposed to spring from St. 1896, c. 517, § 5, forbidding the removal or suspension except after hearing of any "veteran holding an office or employment in the public service of any city or town."

Technically the questions sought to be argued are cut off by the finding of the judge before whom the case was tried that the plaintiff never held an office or employment within the meaning of the statute. It does not appear what evidence the judge believed. We could not say that he found that the plain-

tiff ever was employed by the city at all. But we assume that the finding really means that the plaintiff was employed as a plumber from time to time, and was paid for what he did, but was not employed continuously all the time, and that it implies a ruling that the section does not apply to such an employment. Very plainly it does not, and although we should be slow to admit the validity of a contract by which a department undertook to hamper the working of the statute, it would seem that the contract which it is found that the plaintiff signed was intended mainly to emphasize the fact that he was not employed continuously, and so did not fall within the provision upon which he relies.

It needs no argument to prove that when a man is employed only by the job he is not discharged or suspended if he receives no pay and is left free when his task is done. It is not argued that the statutes forbid such a method of employment, which probably is necessary in some kinds of work.

From what we have said it is evident that it is not necessary to consider the suggestion that the contract, if valid, did not waive any rights. But, in view of the argument, it may be worth while to add that of course the plaintiff's testimony that he did not know what the contract which he signed was and that he did not intend to waive his rights, if accepted, would be no answer to a contract not otherwise open to objection. There was no misrepresentation of the instrument, and the plaintiff could read. If a man signs a lawful contract and the other side is not privy to any improper motive for his signing it, such as may be created by fraud, duress, or mistake as to its contents, he is bound, whatever his voluntary ignorance or his involuntary misinterpretation of its words. *Rice v. Dwight Manuf. Co.* 2 Cush. 80, 87. *Black v. Bachelder*, 120 Mass. 171. *West v. Platt*, 127 Mass. 367, 372. See *Donohue v. Woodbury*, 6 Cush. 148, 151.

Exceptions overruled.

DAVID T. COMPTON vs. INHABITANTS OF REVERE.

Suffolk. March 20, 1901. — June 19, 1901.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

Way, Defect in highway.

When the condition of a street is such as in itself to give notice that the way is not open to public travel, it is not necessary to place barriers there to warn the public that it is unsafe to proceed.

One, who in the daytime enters a street which he knows is not graded or fit for public travel, does so at his peril. The fact that other persons before he entered drove wagons over the street, choosing to take the same risk for the sake of making a short cut, does not help him.

TORT against the inhabitants of the town of Revere to recover for injuries caused by falling on the slope of an embankment in process of construction under an order prescribing the manner of changing the grade at a railroad crossing of Beach Street in that town. Writ dated April 3, 1897.

At the trial in the Superior Court, *Sherman, J.* refused to direct a verdict for the defendant, and left the case to the jury, who found for the plaintiff in the sum of \$2,500. The defendant alleged exceptions. The facts are stated in the opinion of the court.

L. L. G. DeRochemont, for the defendant.

S. L. Whipple & E. V. Grabill, for the plaintiff.

LATHROP, J. The plaintiff seeks to recover for personal injuries sustained by him on account of an alleged defect in a highway in the defendant town. The jury returned a verdict for the plaintiff; and the case is before us on the defendant's exceptions. There were eleven requests for instructions, only one of which need be considered, and that is the last, which is as follows: "That, upon all the evidence in the case, the verdict should be for the defendant."

The undisputed facts in the case are that in consequence of an order of the county commissioners, made on September 1, 1896, it became necessary for the Boston, Revere Beach and Lynn Railroad Company to build a bridge over which Beach Street was to pass, and to raise the grades of Beach Street and

of Ocean Avenue, two highways running at a right angle with each other. The railroad company, by the order, had a year in which to do the work. At the request of the railroad company, the board of selectmen of the defendant town voted to grant permission to the company to close the streets, and the selectmen had nothing to do with the work that was being done on these streets during the fall, winter and spring of 1896 and 1897. The work of changing the grade began about the last of September, 1896, and continued until some time in December of that year. The ground then became frozen, and the work had to be abandoned until the next spring. When work ceased in December, Beach Street was in a very rough condition. The dirt lay as it had been dumped from the tip-carts, and had not been levelled off; and it was obvious to every one who saw it that it was not in a condition for public travel.

The plaintiff lived on Kimball Avenue, a street west of the bridge on Ocean Avenue, and running diagonally into that avenue. On the morning of March 1, 1897, the plaintiff left his house, crossed the bridge, which was then incomplete, went into the middle of the street, and made his way along Beach Street, until he came opposite the grocery of one O'Brien. There was a bank of earth there three or four feet above the sidewalk. In attempting to go down this he slipped and fell, and sustained the injuries complained of.

The plaintiff testified that he had been to O'Brien's many times during the eight months preceding the accident, and that the general condition of things had existed for over a month; and that the street was nothing but a dirt heap; and that there was another way of getting to O'Brien's, but it was more roundabout.

It is obvious that the plaintiff knew all that there was to know about the condition of things; and, in attempting to use the street, did it at his peril. The case cannot be distinguished from *Jones v. Collins*, 177 Mass. 444, unless the question of a want of barriers makes a difference. There was a conflict of evidence on the point whether barriers had ever been placed on Beach Street. But we do not regard the question as material in this case. The object of a barrier is to notify the public that it is unsafe to proceed; but where the condition of the street is

such as is shown by the evidence in this case, the condition itself is as strong a notice as any that could be given.

Nor do we regard it as material that prior to the accident, some wagons were driven over the street. There are always persons who take risks, if a short cut can be made, and who will go over a street even if it is obviously not open to public travel. There is not enough in this case to show that at the time of the accident the way was open to public travel.

This is not the case of a person entering upon a street in the night-time, which he has no reason to suppose defective, but of a person entering a street in the daytime, the grade of which he knows is being changed and which he also knows is not graded, or fit for public travel.

Under these circumstances we are of opinion that the eleventh request should have been given. See *Commonwealth v. Boston & Lowell Railroad*, 12 Cush. 254, 259.

Exceptions sustained.

NATIONAL BANK OF COMMERCE vs. JAMES A. BAILEY, JR.,
assignee.

Suffolk. March 20, 21, 1901. — June 19, 1901.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

Assignment, For benefit of creditors.

In this Commonwealth the time named in a common law assignment for the benefit of creditors within which creditors may sign is regarded as of the essence of the contract, and the creditors who sign within that time acquire thereby the right to have the property distributed among them.

An assignment for the benefit of creditors contained a provision, that no creditor should be deemed a party to it or entitled to the benefit of its provisions who failed to assent in writing to its terms within thirty days from its date, provided, that one who was a creditor at the date of the assignment might become a party after thirty days with the written consent of the assignee. The assignee by a writing indorsed on the assignment extended the time within which creditors might become parties to a period of four months from the date of the instrument. One of the creditors, knowing when the time of signing expired, neglected to sign until after the expiration of the four months and on application to the assignee was refused permission to sign. In a suit in equity brought by this creditor, to have the assignee ordered to give his written consent to the plaintiff's

becoming a party to the assignment, a demurrer to the bill was sustained, on the ground that the defendant was justified in refusing his consent. The fact, that the assignment contemplated a *pro rata* distribution among the creditors of the assignor and that the plaintiff was a creditor, was not enough to entitle the plaintiff to relief. The assignment also contemplated that only those creditors who signed it within the required time should become parties to it, and the plaintiff had not become a party in the manner provided.

BILL IN EQUITY by a bank holding a promissory note and bill of exchange, respectively made and accepted by Francis Batchelder and Company, against the defendant as assignee for the benefit of creditors of that firm, praying that the plaintiff might be allowed to become a party to the assignment and that the defendant might be directed to assent thereto, filed June 11, 1900, and amended January 19 and 30, 1901.

The defendant demurred to the bill. The case was heard by *Lathrop, J.*, who reserved it for the consideration of the full court upon the amended bill and demurrer, such decree to be entered as to the court should seem meet.

C. K. Cobb & W. D. Whitmore, Jr., for the plaintiff. The assignment created a trust in the benefits of which the plaintiff is entitled to share. The trust must be controlled, so that it may be administered reasonably and the trustee ordered to do his duty. This was a common law assignment for the benefit of creditors. The debtor's object was to assign, in order to distribute his property ratably among all his creditors, including the plaintiff. Why should not the plaintiff be allowed to be a party to the trust created for its benefit, on showing that its exclusion by the trustee was not a reasonable exercise of the trustee's discretion?

G. R. Pulsifer, (*W. Bolster* with him,) for the defendant.

MORTON, J. The defendant is the assignee under a common law assignment made by Francis Batchelder and Company for the benefit of their creditors. The plaintiff is and was at the date of said assignment a creditor of the assignors. The assignment was dated December 16, 1899, and contains the following provision: "No creditor shall be deemed a party to this agreement or entitled to the benefit of its provisions, who fails to assent in writing to the terms of the same within thirty days from its date . . . provided, however, that any person who was a creditor of the parties of the first part [Francis Batchelder and

Company] on the day of the date of this indenture, may become a party thereto after thirty days, with the consent of said party of the second part [the assignee] expressed in writing, if the party of the second part see fit to give such consent; that the party of the second part accepts the trusts herein created and covenants and agrees with the parties to this agreement that he will faithfully and impartially execute the same." The plaintiff did not become a party to the agreement within the time limited in it, nor within the four months from its date, to which that time was extended, as alleged in the bill, by the assignee by a writing indorsed on the assignment. In January its board of directors authorized its cashier to sign the agreement. But there is nothing in the allegations in the bill to show, if that is material, that this vote was communicated to the defendant, or that he had any knowledge of it. The cashier neglected to sign the assignment till after the four months had expired, when, upon his offer to do so, the defendant declined to allow him to sign. The prayer of the bill is that the plaintiff may be allowed to become a party to the assignment, and that the defendant may be directed to give his consent thereto. There was a demurrer to the bill and the case was reserved, upon the bill as amended and the demurrer, for the full court, such decree to be entered as shall seem meet.

In addition to what has been stated above the bill alleges that the defendant has in his hands sufficient funds to pay the plaintiff the same dividend that he has paid other creditors who are parties to the assignment and to leave in his hands a surplus for further dividends. It also alleges that defendant declined to allow the plaintiff's cashier to sign on the ground that he could not give his consent without liability to himself. It further alleges that for some time after the date of the assignment there were negotiations between the debtors and their creditors looking to an offer of settlement and the plaintiff did not sign because it supposed that it would be unnecessary to do so in case of a settlement and because it was considering offers of settlement; that the plaintiff's cashier communicated with the defendant from time to time in reference to the advisability of signing, taking the ground that the plaintiff would probably assent and would do nothing to prevent a settlement of the affairs of the debtors

by the assignees; and that in one of his conversations with the defendant the plaintiff's cashier stated that he would decide whether to sign or accept one of the offers of compromise if the defendant would let him know when it became necessary for him to give a definite answer and that the defendant did not dissent and the cashier understood that the defendant would let him know. There are also averments that, in declining to allow the plaintiff to become a party, the defendant is influenced by some motive and purpose unknown to the plaintiff other than the motive and purpose to perform impartially according to its terms the trust reposed in him. There is no charge of fraud unless these averments can be so construed, and the plaintiff does not contend that they should be so construed. It appears from correspondence which is attached to and forms a part of the bill that on March 8, 1900, the defendant wrote to the plaintiff saying in substance that he had received the assent of substantially all of the creditors except five or six of whom the plaintiff was one and that the plaintiff's president had asked him to let him know when he had got the assent of substantially all the creditors except the plaintiff and that he should soon like to have the plaintiff's assent to the assignment. The plaintiff's cashier replied on March 9 saying in substance that he would be in Boston in a few days and would call on the defendant in relation to the assignment. There is nothing in the bill to show that the cashier or any one else representing the plaintiff called on the defendant till after the date to which the time for signing had been extended. Neither is there anything to show that the officers of the plaintiff did not know when the extension of the time for signing would expire. And if the statement in the bill of the conversation between the defendant and the plaintiff's cashier is to be construed as an undertaking on the part of the defendant to inform the cashier when it was necessary for him to decide, (which we doubt,) the defendant's letter of March 8 must be regarded as a substantial performance of that undertaking.

It is possible that in England the plaintiff would be allowed to become a party to the assignment and that, as the plaintiff contends, the English decisions would warrant such a conclusion. See *Whitmore v. Turquand*, 1 Johns. & Hem. 444; *S. C.* 3 De G., F. & J. 107; *Raworth v. Parker*, 2 K. & J. 163; *In re*

Baber's trusts, L. R. 10 Eq. 554. But in this Commonwealth the time within which creditors may sign is regarded as of the essence of the contract and it is held that the creditors who sign within that time acquire thereby the right to have the property distributed amongst themselves. *Battles v. Fobes*, 21 Pick. 239; *S. C.* 2 Met. 93. *Dedham Bank v. Richards*, 2 Met. 105. *First National Bank of Easton v. Smith*, 133 Mass. 26. *National Union Bank v. Copeland*, 141 Mass. 257.

Assuming that the right to refuse his consent is not an arbitrary right to be exercised by the assignee wholly at his discretion and assuming that the alleged reason for refusing his consent was not the best one that could have been given, nevertheless we think that, upon the facts in this case, the defendant was justified in refusing his consent, and that the plaintiff is not entitled to a decree in its favor. There has been no fraud, or misrepresentation or concealment on the defendant's part. The plaintiff knew when the time for signing expired and it is due to its own neglect or inadvertence that it did not sign. No valid excuse is shown for the delay. And the fact that the assignment contemplates a *pro rata* distribution amongst the creditors of the assignors and that the plaintiff is a creditor is not enough to entitle it to relief. It also contemplates that only those creditors who become parties to it in the manner provided shall share in the distribution, and the plaintiff has not become a party to it, in the manner provided. The general averment upon information and belief that the defendant is acting from an improper motive and purpose is not enough, we think, to entitle a plaintiff to relief in a case where, as here, the trustee is acting within the terms of the power that is conferred, and the facts, so far as shown, appear to justify the action that is complained of.

Bill dismissed.

FRANCES B. SAWIN vs. HARRY E. CORMIER.

Suffolk. May 22, 1901. — June 19, 1901.

Present: HOLMES, C. J., KNOWLTON, LATHROP, BARKER, & HAMMOND, JJ.

Devise, Construction.

A testator left the residue of his estate to his wife "to have and to hold at her free will and disposal during the remainder of her life," and, at her death, left "such portions of the estate as may remain" to his daughter. In an action by the widow of the testator to recover damages for a refusal to purchase from her certain land on the ground that she could not give a good title under her husband's will, it was *held*, that the testator left the plaintiff the disposal of his estate and the determination of how much of it should remain, and therefore that she had at least a power to convey a fee.

CONTRACT by the widow of Calvin Heyward Sawin for alleged breach of an agreement to purchase from her a certain lot of land acquired by her under the will of her late husband. Writ dated March 18, 1901.

The answer admitted the agreement and that the plaintiff offered to perform as alleged, but alleged that the only title of the plaintiff to the premises she agreed to convey was derived from the will of Calvin Heyward Sawin, and that her title was not such as to enable her to convey to the defendant a clear title in fee simple, and that for that reason the defendant refused to perform.

The Superior Court upon agreed facts gave judgment for the plaintiff; and the defendant appealed.

H. W. Bragg, for the defendant.

W. W. Stover & E. L. Sweetser, for the plaintiff.

HOLMES, C. J. This is an action for refusing to perform an agreement to purchase certain land left to the plaintiff by her husband. It is here by appeal after judgment for the plaintiff upon agreed facts, of which the foregoing and the will alone are important. The only question is whether the will enables the plaintiff to give a good title.

The material words are as follows: "All the rest of my Estate both Real and Personal I give to my beloved wife Frances Burton Sawin, to have and to hold at her free will and disposal

during the remainder of her life; at her death such portions of the Estate as may remain, I hereby direct and bequeath to my daughter Cora Frances Osgood or her heirs. In case of her death, and leaving no children, I hereby bequeath the remainder to be divided equally between my other legal heirs."

"To hold at her free will and disposal" are stronger words than naturally would be used for the enjoyment of a life estate without more. *Ford v. Ticknor*, 169 Mass. 276, 280. The meaning is made clearer by the words "such portions of the estate as may remain." *Gifford v. Choate*, 100 Mass. 343, 346. *Attorney General v. Hall*, FitzG. 314, 321. Taking the two together, we are of opinion that the testator left to the disposal of the plaintiff how much of his estate should remain, and therefore that she had at least a power to convey a fee. *Johnson v. Battelle*, 125 Mass. 453.

Judgment for plaintiff.

TAUNTON SAVINGS BANK vs. HENRY G. BURRELL & others.

Norfolk. May 23, 1901. — June 19, 1901.

Present: HOLMES, C. J., KNOWLTON, LATHROP, HAMMOND, & LORING, JJ.

Mechanic's Lien, Bond to dissolve. Estoppel.

W., the owner of land on which there was a mechanic's lien, transferred it through a third person to his wife by a conveyance which was fraudulent and void as against creditors. Thereafter he gave to the mechanic a bond under Pub. Sta. c. 191, § 42, to dissolve the lien, purporting to release the land altogether therefrom. A mortgagee of the land brought a suit in equity against the mechanic to enjoin him from enforcing his lien. W. and his wife had a child. *Held*, that it was unnecessary to decide whether W. when he gave the bond had an interest in the property within the meaning of Pub. Sta. c. 191, § 42; that, if W. had such an interest as entitled him to give a bond under the statute, and if the bond was not invalidated by his attempt to release the land altogether instead of "his interest in such property", as authorized by the statute, the bond in any case could go no further than to release his interest, and the defendant could not be prevented from asserting his lien subject to W.'s tenancy by the curtesy initiate.

The holder of a mechanic's lien who takes a bond under Pub. Sta. c. 191, § 42, from one claiming to have an interest in the property on which the lien is to be enforced, is not estopped thereby from denying such interest or contesting the validity of the bond.

BILL IN EQUITY by a mortgagee of certain land, to enjoin the enforcement of mechanics' liens thereon, filed March 1, 1901.

In the Superior Court, *Stevens*, J. dissolved a temporary injunction theretofore granted and ordered the bill dismissed, unless the defendants should assign to the plaintiff all their rights in the bond given to dissolve their liens on receiving from the plaintiff the amounts for which their liens were established with interest thereon, and, at the request of the plaintiff, reported the case for the consideration of this court. If the ruling was right, the order was to be affirmed; otherwise, the defendants were to be enjoined. The bond to dissolve the liens was executed and delivered June 9, 1898. The only material fact, appearing in the report and not stated in the opinion of the court, is that Way, the obligor of the bond, had a child by the wife to whom the land was conveyed.

A. S. Phillips & W. E. Fuller, Jr., for the plaintiff.

O. A. Marden, for the defendants.

HOLMES, C. J. This is a bill in equity to enjoin the principal defendants from further enforcing mechanics' liens upon certain land of which the plaintiff is mortgagee. The bill goes on the ground that a bond was given under Pub. Sts. c. 191, § 42, and that this ended the defendants' right to proceed. The bond was given by one William T. Way, who had employed the defendants who assert the liens. At the date of the bond the land had been conveyed by Way through a third person to his wife, by a deed which was fraudulent and void as against creditors. The questions raised are whether Way was, or the defendants are estopped to deny that he was, a "person having an interest in" the property within the meaning of Pub. Sts. c. 191, § 42, (as otherwise, it is admitted, the liens would not be released, *Landers v. Adams*, 165 Mass. 415;) and what would be the effect of the bond if it was good under the act.

Taking these questions in the reverse order, the answer to the last is enough to dispose of the case. The section only provides a mode in which a person having an interest in the property may "release his interest in such property, or in any portion thereof." Therefore, if Way had a right to give a bond under the statute at all, it could go no further than to release his interest, and the defendants could not be prevented from assert-

ing their lien subject to Way's tenancy by the curtesy initiate. Way's bond in fact purported to release the land altogether. If this mistake did not invalidate the bond, at least it could not give it a greater effect than would have been produced by one in proper form. Even if the sale ought to be subject to Way's rights, an injunction does not seem to be necessary to that end, it would do the plaintiff no appreciable good, and in that limited form is not the object of the bill.

We see no ground on which the defendants should be estopped to assert any objection to the bond which they can make good. They did nothing beyond taking their part in a proceeding which any one claiming an interest in the land might institute, whether they liked it or not. At the time they supposed the bond to be good. Moreover the plaintiff knew nothing of the facts, and was not privy to them if it had known them, and, in short, neither appears to have changed its position on the faith of the defendants' conduct nor to have had any right to do so with legal effect.

Whether Way had an interest in the property within the meaning of Pub. Sts. c. 191, § 42, it is unnecessary to decide.

Decree affirmed.

ABBIE T. N. COBB vs. MASSACHUSETTS CHEMICAL COMPANY
& another.

Norfolk. March 8, 1901. — June 20, 1901.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

Easement. Mills. Equity Jurisdiction, Continuing trespass, Assessment of damages.

One owning a raceway crossing the land of another lawfully may remove in a reasonable way all obstructions to the usual flow of the water.

The mill acts give the right to flow but not to excavate land.

The defendant, a manufacturing corporation, owned a strip of land eleven feet wide running through the land of the plaintiff and had the right to use it as a raceway for its mill. The defendant in clearing out the raceway widened it to twenty feet or more, thus making an unlawful use of the plaintiff's land which it intended to continue. In a suit in equity seeking an injunction and also an order to the defendant to restore the plaintiff's land to its condition before the trespass, it was held, that the plaintiff was entitled to an injunction against such a continuing trespass, but, as the value of the land interfered with was very small and

the advantage to the plaintiff of restoring it to its former condition would be very slight, and the expense to the defendant would be much greater than the advantage to the plaintiff, that justice and equity did not require that the defendant should be ordered to restore the land to its former condition, but that the damages suffered by the plaintiff from the acts already done should be assessed, and the defendant be enjoined from further unlawful acts.

BILL IN EQUITY by the owner of certain land in Walpole crossed by a small stream running into the Neponset River and used by the Massachusetts Chemical Company, one of the defendants, as a raceway, alleging, that nearly an acre of the plaintiff's land lay between the stream and the Neponset River, and to obtain access to this piece of land, the plaintiff for a long time had maintained across the stream a bridge suitable for the passage of teams, and that the defendant company wrongfully entered with a large force of men upon the land of the plaintiff, removed the bridge, cut down the trees and underwood growing upon the banks of the stream, and excavated and dug away the bed and the banks of the stream and deposited the earth and the stones so excavated upon the plaintiff's land, and in so doing increased the depth of the stream by about two feet and its width by over ten feet and deprived the plaintiff of all means of access to the acre of land mentioned above, and praying, first, that an injunction issue perpetually restraining the defendant company, its officers and agents, from repeating the wrongful acts alleged, or trespassing upon the plaintiff's land, or injuring or disturbing the plaintiff's property; second, that the defendant company be ordered to restore the land and property of the plaintiff to its original condition; third, that adequate damages be awarded to the plaintiff for the injury to her property; and, fourth, for such other relief as the case might require, filed October 11, 1900.

The defendant company in its answer relied upon a deed from one Oliver Clap to the Union Manufacturing Company, the defendant's predecessor in title, dated December 22, 1814. It also alleged that whatever it had done upon the land of the plaintiff was done lawfully by virtue of its title and mill privilege, and under the authority derived from Pub. Sts. c. 190. The deed from Clap conveyed a strip of land "eleven feet wide to the Neponset River so called, said land is occupied as a raceway for the water which carries said factory"; that is, the factory of

the grantee, the Union Manufacturing Company, the defendant's predecessor in title.

The case was heard in the Superior Court, by *Bell, J.*, who made a decree dismissing the bill without costs; and the plaintiff appealed. The judge, at the plaintiff's request, made the following statement of facts found by him:

There was an old raceway leading across the plaintiff's land from the defendant's mill to the river below. The right to maintain this raceway had been conveyed to the defendant's predecessors in title early in the century. The width fixed by the deed was eleven feet. This raceway had become narrowed and stopped up in places and was wider than eleven feet in others. The river below its mouth had become partly filled by sand and stones washed down by a freshet. The defendant corporation at the time of filing the bill had substantially completed the work of clearing out the raceway and the river below it. In doing so it had widened the raceway to twenty feet or more. The officers of the defendant corporation testified that it was their intention to put in retaining walls leaving a width of fifteen feet. In addition to widening the raceway beyond eleven feet, they deposited some of the materials removed upon the banks. The value of the plaintiff's land interfered with was very small, not exceeding \$25. There is no difficulty in restoring the soil. But the advantage to the plaintiff would be very small while the expense would be very much more than the advantage. The injury to the plaintiff can be fully compensated by damages.

A. Hemenway, (J. Noble, Jr., with him,) for the plaintiff.

C. F. Jenney, for the Massachusetts Chemical Company.

HAMMOND, J. The defendant, the Massachusetts Chemical Company, as the successor to the grantee named in the deed of December 22, 1814, is the owner of the strip of land running through the land of the plaintiff, and has the right to maintain thereon the raceway of that width; and, whether the strip be the bed of an artificial canal or of a natural stream, may lawfully remove in a reasonable way all obstructions to the usual flow of the water. In some such cases it is reasonable to place some of the obstructions upon the neighboring land. *Prescott v. White*, 21 Pick. 341. *Prescott v. Williams*, 5 Met. 429.

The judge has found that the company in clearing out the raceway widened it to twenty feet or more. This they could not lawfully do either under their deed or the mill acts. These statutes relate to flowing, and not to excavating, land.

Under the facts as found, it is clear that the company has made an unlawful use of the plaintiff's land, and intends to continue in such use. If the use be continued, it may in time ripen into a title by prescription, and we are of the opinion that the plaintiff is entitled to an injunction against such a continual trespass. She ought not to be compelled to sell her land in this way. It appearing, however, that the value of the land interfered with is very small, and that the advantage to the plaintiff of restoring it to its former condition would be very slight, and the expense to the defendants would be much greater than the advantage to the plaintiff, we do not think justice and equity require that the company should be ordered to restore it to its former condition. As the jurisdiction in equity is sustained for the purpose of injunction, it may be retained for the assessment of the damages suffered by the plaintiff for what has been already done.

The result is that the plaintiff is entitled to a decree against the defendant, the Massachusetts Chemical Company, awarding her damages, and enjoining it substantially as asked in the first prayer of the bill.

The court has found that the value of the plaintiff's land interfered with does not exceed \$25. Of course the value of the land may not be the true measure of damages. If the parties can agree as to the damages, a decree may be entered for the sum agreed upon ; otherwise damages are to be assessed.

To prevent misapprehension it is well to state that the decree is not to be so framed as to shut off whatever rights the Chemical Company has under the statutes relating to mills or under the deed of Clap to the Union Manufacturing Company.

So ordered.

JAMES M. WHITE vs. DAHLQUIST MANUFACTURING
COMPANY & others.

SAME vs. EDWARD B. DAHLQUIST & another.

Suffolk. May 6, 1901. — June 20, 1901.

Present: HOLMES, C. J., KNOWLTON, LATHROP, HAMMOND, & LORING, JJ.

Frauds, Statute of, Memorandum. Auction, Deposit, Authority of Auctioneer. Agency. Estoppel, By conduct.

In order to satisfy the statute of frauds, a memorandum of a contract for the sale of lands, need not name or describe the vendor, if it is signed by an agent acting for him.

Under Pub. Sta. c. 78, § 1, cl. 4, and § 2, the consideration for the promise sought to be enforced need not be stated in the memorandum, even in the case of a contract for the sale of lands.

At an auction sale of lots of real estate the terms of sale required a "deposit" of \$100 upon each sale. In a suit in equity by a purchaser of two separate properties at the sale, to enforce the contract to convey the lots to him, it appeared, that the defendant had placed the two properties with the auctioneer for sale; that immediately after the auction a memorandum of one of the plaintiff's purchases was given to him by the auctioneer, and the plaintiff gave to the auctioneer his check for \$100, the defendant being present; that the auctioneer told the plaintiff that it would be time enough to bring the \$100 for the other purchase the next day; that the next day the plaintiff brought to the auctioneer his check for \$100 upon his second purchase and received a memorandum of that purchase signed by the auctioneer; and that the auctioneer cashed both checks and obtained the money. *Held*, that a check so given and accepted fairly might be said to be a deposit within the general understanding of the word as used at sales by auction. *Held, also*, that the signing of the memorandum by the auctioneer on the day after the sale was good for the purpose of satisfying the statute of frauds, his agency for the seller still existing.

Because an auctioneer is the agent of both seller and buyer for the purpose of signing a memorandum of a sale made by him, it does not follow that his agency for the one is coextensive in its nature and duration with that for the other. His agency for the buyer is usually conferred when the bid is accepted and begins with the fall of the hammer. Such an authority must be exercised contemporaneously with the sale. But the auctioneer's agency for the seller is generally more extensive and may cover a time both before and after the sale. When such authority exists and is not revoked, the auctioneer may bind the seller by a memorandum signed within a reasonable time.

In an action to enforce a contract of the defendant to convey certain land to the plaintiff, it appeared, that the plaintiff visited the office of the defendant's counsel who in the presence of the defendant gave the plaintiff a draft of a deed of the land prepared for execution by the defendant and by his wife as releasing dower, to take to the plaintiff's conveyancer who was to examine the title. Later the plaintiff demanded a deed of the land which the defendant refused. Neither the

plaintiff nor his attorney had returned the draft and so far as appeared had retained it in their possession. *Held*, that the plaintiff by his retention of the draft in no way lost his right to require a deed.

TWO BILLS IN EQUITY, one, to compel the defendant Edward B. Dahlquist to convey to the plaintiff certain lots of land numbered 15, 17 and 19 on Bolton Street in that part of Boston called South Boston belonging to the said defendant and conveyed to him by an unrecorded deed of the defendant the Dahlquist Manufacturing Company, and to compel the defendant, Mary E. Dahlquist, wife of said Edward, to execute a release of dower in the said land, and the other, to compel Mary E. Dahlquist to convey to the plaintiff a certain lot numbered 40 on Third Street in said part of Boston belonging to the said Mary, and to compel Edward B. Dahlquist to join in said conveyance as her husband, filed respectively January 6, 1899, and December 8, 1898.

The answers in both cases set up, that there was no memorandum in writing of the contract of sale alleged in the plaintiff's bill signed by the party to be charged therewith or by some person thereto by him lawfully authorized, as required by Pub. Sts. c. 78, § 1.

The Superior Court gave a decree for the plaintiff in each case, ordering the performance of both contracts alleged; and in each case the defendants Edward B. and Mary E. Dahlquist appealed.

It appeared by the evidence which was printed by agreement, that in each case the land in question was offered at auction through one Hogan as auctioneer and that the plaintiff was the highest bidder and complied with the terms of the sale. As to the sale of the lots on Bolton Street, Hogan testified, that the following instrument was signed by him and by the plaintiff, and that no change was made in the instrument after it was signed, except that "James M. White", the plaintiff's name, in the first line of the agreement, was filled in afterwards by a girl in the office. The instrument was as follows: "South Boston, November 22, 1898. I Hereby Acknowledge, That James M. White has been this day declared the highest bidder and purchaser of a certain piece or parcel of land with building thereon situated in that part of Boston called South Boston, being num-

bered 15, 17, 19 Bolton street, in said South Boston. Building of brick two stories high. Lot of land 40×55 for the sum of Twenty-seven Hundred Dollars; and that he has paid into my hands the sum of One Hundred Dollars, as a deposit, and in part payment of the purchase money; and I hereby agree that the vendor shall in all respects fulfil the conditions of sale. John Hogan.

“And I hereby agree to pay remaining sum of Twenty-six hundred Dollars, unto the vendor, on or before the 30th day of December, 1898. James M. White.”

The plaintiff testified, that at the time of one of the interviews described by him he received from the defendants' counsel an unexecuted draft of a deed of the Bolton Street property from Edward B. Dahlquist, to the plaintiff, with a clause releasing the dower of Mary E. Dahlquist. The plaintiff testified to a subsequent tender of the balance of the purchase money due under the agreement made by him to Dahlquist and to Dahlquist's counsel, Mr. French, at Mr. French's office, and that he demanded a deed of the property. On cross-examination he testified, that the first time he went to Mr. French's office, Mr. French had the draft of the deed mentioned above and submitted it to the plaintiff, to take to his conveyancer to examine the title, and that he never returned it to Mr. French; also, that as far as he knew nobody had ever expressed any opinion with reference to the title or with reference to the deed, either to Mr. French or to Mr. Dahlquist, and as far as he knew he or his counsel had kept this draft of a deed ever since that time, and that he did not have the draft of the deed in his possession at the time he called at Mr. French's the day he made the tender.

There also was evidence of a tender by the plaintiff of the balance of the purchase money for the Third Street property. The memorandum of the sale of this property delivered to the plaintiff by the auctioneer was as follows: “Nov. 23d 1898. Received of James M. White One hundred dollars deposit on sale by auction of No. 40 Third street, South Boston. John Hogan.”

Hogan testified among other matters as follows: “The Third Street property and the Bolton Street property are really adjoining property and are connected. There were about the same

number of people at the sale on Third Street. Most of the people stayed from the beginning to the end of the sales. There were six bids on the property at 40 Third Street. Mr. White was the highest bidder, and his bid was \$900. I declared him to be the purchaser at that sale. Nothing was said at that sale when the papers were to be passed. I received a check for \$100 from Mr. White on the first purchase, the Bolton Street property. I indorsed the check and have the money in the bank. I did not receive any money from him for 40 Third Street at the time of the sale, and Mr. White said he would get me a check. I told him he had no need to as I had already received \$100 that bound it. I said, 'You can bring that up in the morning.' It was a November day and it was getting a little late, and I was supposed to sell all the machinery in the building, after selling the building. I told Mr. White I did not want him to bother to run down to his office and back, and that in the morning it would be time enough to bring up the \$100. The next morning I received, at my office, a check for \$100, and have obtained the money on both of these checks. On the next following morning I gave Mr. White no papers at my office. I gave him a paper at the sale, after knocking down 15, 17 and 19 Bolton Street to him. This paper was an agreement that he was the highest bidder, and I had so declared him [identifying the memorandum in regard to the Bolton Street lots printed above]. The next morning I gave him the paper marked [the memorandum in regard to the Third Street lot], when he gave me his check for \$100. At time of sale of 15, 17 and 19 Bolton Street, I stated that buyer had until on or before December 30."

On behalf of the defendants, it was contended: 1. That the auctioneer exceeded his authority by accepting a check; that, whether the auctioneer was instructed to receive only "cash" or no instruction was given as to mode of payment, he could only accept cash, and a check is not cash; and that for this reason both contracts were void. 2. That the memoranda were not sufficient because they did not name or describe the owner of the premises. 3. That the memoranda were not sufficient because they did not contain the material terms of the contract. 4. That the memorandum of the sale of the Third Street property

was not sufficient, because not signed on the spot and at the time of the sale, and was not signed until the following morning. 5. As to the sale of the Bolton Street property described in the first entitled cause, the defendant Edward B. Dahlquist contended that, in addition to the other defences above specified, the retention of the draft of the deed, furnished to the plaintiff by the defendant through his counsel, excused him from making the conveyance of that parcel. 6. As to the sale of the property described in the second entitled cause, the defendant Mary E. Dahlquist contended that her knowledge of and acquiescence in the sale was not enough under the circumstances to estop her from repudiating the subsequent acts of the auctioneer.

Asa P. French & G. W. Abele, for the defendants.

M. J. Creed & J. P. Crosby, for the plaintiff.

HAMMOND, J. The defendants contend that each memorandum is insufficient under the statute of frauds because as they allege it does not name or describe the owner of the land sold and some other material parts of the contract.

It is not always necessary that the memorandum should name or describe the owner. Where, as in a case like this, it is signed by a person who is in fact an agent and acting as such, the existence and identity of the principal may be proved by parol, and he may sue or be sued upon the contract. *Williams v. Bacon*, 2 Gray, 387. *Lerned v. Johns*, 9 Allen, 419. *Gowen v. Klous*, 101 Mass. 449.

It has also been settled by this court that, whatever may be the doctrine elsewhere, under our statute the consideration for the promise sought to be enforced need not be stated in the memorandum even in the case of a contract for the sale of real estate. Pub. Sts. c. 78, § 1, cl. 4, and § 2. *Hayes v. Jackson*, 159 Mass. 451.

While the memorandum says nothing about the taxes or the time within which the contract should be carried out, it may be said that the evidence as to what the contract was upon those points was conflicting and it would warrant a finding that there was no definite agreement upon them, and the Superior Court may have so found. As to the mortgage on the Bolton Street property, it was at most at the option of the purchaser whether it should be paid or not by the seller, and it appears by the

memorandum that the seller has in substance agreed to pay it. There is nothing in it inconsistent with the terms of the sale, but it simply shows that the purchaser had made his election and the seller had agreed to be bound by it. So far as respects the mortgage, therefore, the memorandum contained the contract of sale as finally agreed upon, in accordance with the option given to the purchaser at the time the property was struck off to him.

As to the contention that one of the terms of the sale was that there should be a cash payment of \$100 on the spot at the time of the sale, and that the auctioneer had no authority to take a check instead of money, it may be said that the whole testimony taken together would seem to indicate that the auctioneer called for simply "a deposit" of \$100, and that the defendant was present acting for himself and as the agent of the wife, and heard the declaration and made no objection to it. It appeared that the plaintiff gave his check for that amount to the auctioneer for the Bolton Street property, and another check for the same amount the next day for the Third Street property; that both checks were good and were duly honored. Such a check, if satisfactory to the seller or the auctioneer, may fairly be said to be a deposit within the general understanding of the phrase as used in sales by auction.

It is still further objected that as to the Third Street estate the memorandum was not signed until the next day, and that the auctioneer had no authority at that time to bind the defendants. The general rule is that the memorandum may be signed at any time subsequent to the formation of the contract, at least before action brought. *Browne, St. of Frauds*, § 352 *a*, and cases cited. *Lerned v. Wannemacher*, 9 Allen, 412, 416. *Sanborn v. Chamberlin*, 101 Mass. 409, 416. And this rule is applicable where the contract is made by an agent and the subsequent memorandum is signed by him during the existence of his agency. It has been sometimes thought that there is an exception to this rule in the case of auctioneers (see the authorities referred to in *Browne, St. of Frauds*, § 358,) but the exception is more apparent than real. The question does not turn upon the fact that the agent is an auctioneer but upon the scope and duration of the agency. While it is said that an auctioneer

is the agent of both seller and purchaser for signing the contract, it does not follow that his agency for the one is coextensive in its nature and duration with that for the other. The word "auctioneer" is sometimes used to designate the crier who simply calls for bids and strikes the bargain at an auction sale. His connection with the sale may begin with calling for bids and end with striking the bargain. If that be the only authority given him by seller and purchaser, it may be said that while the power to strike the bargain fairly imports authority to make his work effectual by signing the memorandum necessary to bind the parties, it also implies that that act shall be substantially contemporaneous with the sale and as a part of it. In such a case the agency of the auctioneer is substantially ended with the auction, and his authority to bind either party by a memorandum would not extend beyond that time. And so far as respects the purchaser, the authority of the auctioneer as a usual rule is confined to the actual time of the auction. It is conferred by the bid when accepted, and therefore begins with the fall of the hammer. The technical ground is that the purchaser by the very act of bidding "calls on the auctioneer or his clerk to put down his name as the bidder, and thus confers an authority on the auctioneer or clerk, to sign his name, and this is the whole extent of the authority." Shaw, C. J., in *Gill v. Bicknell*, 2 Cush. 355, 358. Such an authority must be exercised contemporaneously with the sale. See Browne, St. of Frauds, § 353, and cases cited in the notes.

But primarily and actively the auctioneer as a rule is the agent of the seller, and as to him his authority is generally more extensive, and may cover a time both before and after the sale. Frequently the property is put into his hands for sale, and all the details are left entirely to him. He is expected to make all the arrangements by way of public advertisement and otherwise, and to act fully at the sale, to receive the deposit from the purchaser and to carry the transaction to the end. Such authority from a seller to an auctioneer does not end with the auction sale but extends beyond it, and until it is revoked the auctioneer may properly bind the seller by a memorandum signed within a reasonable time. He does this not simply because he is the crier at the sale, but because his agency by the fair understanding

between him and the seller extends to the final consummation of the contract, and is not affected by the fact that he also acts as crier.

In the present case Hogan the auctioneer testified that he was in the real estate and insurance business and had been for several years, that a week or ten days before the sale Dahlquist "placed the property with me for sale." Hogan advertised it by means of handbills and newspapers, and seems to have been given full authority to sell the property, subject to instructions as to price. He received and kept after the auction the deposits made by the purchasers, and the evidence would fully warrant a finding that the understanding was that his agency for the defendants should continue until the sale was completed, and that it had not been revoked at the time Hogan signed the memorandum. Upon such a finding the general rule applies, and since Hogan was acting during the continuance of his agency, he could properly bind his principals by signing the memorandum.

While the defendant Mary E. Dahlquist does not appear actively in the case, the evidence sufficiently shows that her husband had authority to act for her, as owner of the Third Street property, and she is bound.

There is no merit in the objection that the plaintiff did not return to the defendants the deed which had been drawn up for their signature.

Decree affirmed in each case.

ALICE M. STUART vs. RELIANCE INSURANCE COMPANY.
SAME vs. DELAWARE INSURANCE COMPANY.

Suffolk. March 7, 1901. — June 21, 1901.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

Insurance, Fire, Provision prohibiting sale of property. Agency.

Whether the prohibition of the sale of the insured property without the assent in writing of the company in the standard form of fire insurance policy, prescribed

by St. 1894, c. 522, § 60, applies to a sale on execution or to a foreclosure sale not within the control of the policy holder or of the company, *quære*.

Assuming that a sale on execution of property insured against fire, and the expiration of the time for redemption, might be a violation of the provision in the standard form of policy, that the property shall not be sold without the assent in writing of the company, there is no violation of the provision so long as there is a right of redemption leaving an insurable interest in the policy holder.

The provision in the standard form of fire insurance policy, that the property shall not be sold without the assent in writing of the company, is violated by a temporary alienation of the property.

A fire insurance policy in the standard form, containing the usual prohibition of the sale of the property insured without the assent in writing of the company, was made payable in case of loss to a mortgagee named. A creditor of the assured mortgagor sold the property on execution. Thereafter the mortgagee foreclosed and through another conveyed the property back to the assured mortgagor. The insurance company did not assent in writing to the sale on execution or to the foreclosure sale. After the sale on execution and again after the foreclosure sale the assured notified the agent of the insurance company through whom the policy was issued of the respective sales and requested him to notify the company and keep the policy in force. After foreclosure the mortgagee released his interest as mortgagee in the policy, and the agent assented in writing to the release. Thereafter the assured made a new mortgage of the property and the policy was made payable to the new mortgagee. To this the agent assented in writing in behalf of the company. The company was organized in another State and the agent held a certificate as agent of the company issued by the insurance commissioner under St. 1894, c. 522, § 91. In an action on the policy, it was held, that, whether the sales were within the prohibition of the policy or not, the circumstances would warrant a jury in finding, that the recognition of the policy thereafter by the agent as a valid and subsisting policy was within the scope of his authority, and that under the statute named the company was bound by it; also, that the agent's action well might have been found to have been taken with the knowledge and acquiescence of the company or at least with such notice on its part as required it to exercise its right to avoid the policy within a reasonable time, or to be regarded as having waived it.

TWO ACTIONS OF CONTRACT upon policies of insurance against fire in the form prescribed by St. 1894, c. 522, § 60, upon a dwelling house and building materials of the plaintiff. Writs dated September 1, 1900.

The answer in each case alleged, that in violation of the provisions of the policy the insured property had been sold without the assent in writing of the company, whereby the policy became void. The cases were heard in the Superior Court, by *Gaskill, J.*, who reported them for the consideration of this court. The action of the judge, the terms of the reservation and all material facts are stated in the opinion of the court.

H. P. Moulton, (J. F. Quinn with him,) for the defendants.

C. E. Shattuck, for the plaintiff.

MORTON, J. These are two actions upon policies of insurance issued to the plaintiff by the respective defendants upon a dwelling house and building materials belonging to her and situate in Marblehead. The two actions were tried and argued together. The policies are in the Massachusetts standard form, and each provides amongst other things that it shall be void if the property insured shall be sold without the assent in writing of the company. At the trial the facts were agreed, and the defendants requested the court to direct verdicts for them. The judge refused to do so, and thereupon the defendants, not desiring to go to the jury, consented that, subject to their exception to the refusal of the court to rule as requested, verdicts should be directed for the plaintiff, which was done. The cases are here upon the report of the presiding justice which concludes as follows: "If upon the facts there can be a recovery for the plaintiff judgments are to be entered on the verdicts; otherwise the verdicts are to be set aside and a new trial granted."

From the facts as agreed it appears that the policy of the Reliance Company was issued September 9, 1897, and that of the Delaware Company April 14, 1898, and that the loss occurred May 17, 1900. Both policies were for five years and were made payable in case of loss to Benjamin L. Kimball, mortgagee, and to each there was "a rider attached, insuring, during process of construction, materials for said building in and about the premises." And the report states that from the time when the policies were issued to the time of the fire the plaintiff had materials on the premises and that part of the loss was on such materials. On September 20, 1898, a creditor of the plaintiff sold on execution the real property insured but not the building material, and on September 25, 1899, Kimball foreclosed his mortgage and conveyed the property to one Jackson who on October 7, 1899, conveyed it to the plaintiff. "Jackson acted throughout this transaction as the agent and trustee of the plaintiff and the purchase money paid the mortgagee at the foreclosure sale was furnished by the plaintiff." The conveyances from Kimball to Jackson and from Jackson to the plaintiff "were parts of one transaction the object of which was to immediately vest the entire interest in the property in the plaintiff," and the delay from September 25 to October 7 was caused

by the absence of one of the parties to the deeds. The written assent of the defendants to the sale on execution and to the foreclosure sale was not obtained. Shortly after the sale on execution, namely, about October 24, 1898, the plaintiff's husband who acted throughout the matter of insurance as her agent, notified one Newhall through whom the policies were issued and who was the agent of the defendants, that the property had been sold on execution, and requested him to keep the policies in force, and give the companies any notice that was necessary for that purpose. After the foreclosure sale and prior to November 6, 1899, the plaintiff's husband also notified Newhall that the foreclosure sale had occurred, and requested him to notify the companies to keep the policies in force. Kimball released his interest as mortgagee in the Reliance policy and Newhall as agent of that company assented in writing to the release November 6, 1899. On October 7, 1899, the plaintiff mortgaged the premises to one Caroline E. Marsh and this policy was made payable to her as mortgagee and Newhall as agent of the company assented in writing November 6, 1899. Kimball released his interest as mortgagee in the Delaware policy March 10, 1900, and this also was assented to in writing by Newhall as agent for that company. When the policies were issued and throughout the period covered by these transactions Newhall was the duly appointed agent of the defendants in this Commonwealth, and held as such a certificate or license from the insurance commissioner issued in accordance with St. 1894, c. 522, § 91, which continued in force all the time. Section 91 above referred to provides amongst other things that "while such certificate remains in force the company shall be bound by the acts of the person named therein within his apparent authority as its acknowledged agent."

The defendants contend that the policies are void because the property was sold without their written assent, that the word "property" in the condition means the dwelling house and does not include the building material, that Newhall had no authority to waive the condition, and that if he had such authority there is no evidence of waiver by him.

There may be some question whether a sale on execution or a foreclosure sale comes within the terms of these policies. Such

a sale would not be within the control of the policy holder or of the company. See *Smith v. Putnam*, 3 Pick. 221. But if we assume that the provision in the policy means if the property shall be sold in any way, it is clear that a sale on execution does not constitute a sale within the meaning of the provision so long as there is a right of redemption; in other words so long as an insurable interest remains in the policy holder. *Strong v. Manufacturers' Ins. Co.* 10 Pick. 40. *Clark v. New England Ins. Co.* 6 Cush. 342. *Clinton v. Norfolk Mutual Ins. Co.* 176 Mass. 486. But from September 20, 1899, when the right to redeem expired to the twenty-fifth of the same month, when the foreclosure sale occurred, the plaintiff was entirely divested of any title to or interest in the dwelling house. The plaintiff contends that this was only a temporary matter, that the dwelling house was only a part of the property insured, and that the want of a written assent was waived by the companies. The fact that the alienation was a temporary one would not, it seems to us, render it any the less operative or effectual to avoid the policy. *Hill v. Middlesex Mutual Assurance Co.* 174 Mass. 542. But we think that there was evidence of a waiver by the defendants of a written assent both in regard to the sale on execution and the foreclosure sale. The defendants were foreign companies. Newhall was the duly appointed agent of each of them within this Commonwealth. He had a certificate as such from the insurance commissioner. It does not appear that the defendants had any other agent in this State. There is nothing to show, as there was in many of the cases relied on by the defendants, that the authority which he had was a limited authority. The policies were issued through him. More than a year after the execution sale he assented in writing as agent of the Reliance Company to a release by Kimball of his interest as mortgagee in the policy issued by that company, and to a transfer of the policy to Caroline E. Marsh as mortgagee. At a still later date he assented in writing as the agent of the Delaware Company to a release by Kimball as mortgagee of his interest in that policy. He was thus recognizing the policies as valid and subsisting policies long after the sale on execution and the foreclosure sale had taken place. In view of all these circumstances we think that the jury would have been warranted in finding that what he did was within the

apparent scope of his authority, and, if it was, then under the statute referred to above, the defendants were bound by it. Moreover, shortly after each sale he was notified that it had taken place and was requested to give the companies notice to keep the policies in force. It is to be presumed that he did so. And his action in subsequently recognizing the policies as valid and subsisting policies might well have been found to have been with the knowledge and acquiescence of the companies, or at least with such notice on their part as required them to exercise their right to avoid the policies within a reasonable time or they would be regarded as having waived it.

The result is that we think that there should be judgment on the verdicts.

So ordered.

FRANK LEVERONE vs. JOSEPH ARANCIO.

Suffolk. March 19, 20, 1901. — September 3, 1901.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

Contract, Building contracts, Construction. Agency, Authority of architect. Evidence, Extrinsic to vary writings. Practice, Civil, Exception, Verdict. Auditor's Report.

An architect whose approval is a condition precedent to payments to be made under a building contract has no authority to waive an agreement by the owner as to the terms on which payment shall be made.

A building contract provided, that "the contractor under the direction and to the satisfaction of C., architect, acting for the purposes of this contract as agent of the said owner, shall and will provide all the materials and perform all the work mentioned in the specifications and shown on the drawings." *Held*, that this did not go further than to make the architect the agent of the owner in the matter of deciding whether the work done fulfilled the requirements of the specifications and drawings, and did not give him authority to waive, in behalf of the owner, the terms on which the owner had stipulated that the payments were to be made when the work described had been done to the architect's satisfaction.

The specifications of a building contract contained the following provisions: "Before any final estimate shall be allowed by the architect in charge, the contractor will be required to sign a certificate on said estimate that he will accept the same as a settlement in full for all claims against the owner on account of work done under this specification and contract. The contractor shall also sign and duly attest a statement, before final payment is made, that all claims for materials provided or labor performed on this property are paid and satisfied in full, and

that there are no claims whatsoever against the owner of this property." *Held*, that the foregoing requirements were conditions precedent which the contractor must fulfil before he could sue on the contract.

The mason's specifications of a building contract contained the provision "All needed permits must be obtained from the proper authorities." The construction of a bay window was included under the mason's specifications, and it appeared, that a permit for a bay window would be issued only upon a personal application by the owner of the property. It further appeared, that before the making of the contract the owner had applied twice for such a permit and had failed to obtain one, and that the permit was obtained by him six weeks after the contract was signed. The owner being sued on the contract sought to be allowed in recoupment for damages caused by the work being suspended for six weeks immediately after it was begun on account of the want of the bay window permit and also the amount of \$22 expended by him in finally procuring such a permit. *Held*, that, if by the proper construction of the above provision of the specifications it was made the duty of the plaintiff to obtain the bay window permit, he had not undertaken, by agreeing to perform the work prescribed in the specifications, to insure that the permit would be issued without delay. *Held*, also, that the defendant was not entitled to be allowed the \$22 paid by him, as the provision did not throw upon the plaintiff the duty of obtaining the bay window permit, which had to be obtained on the personal application of the owner. *Quære*, whether the requirement went any further than to provide that no work should be done until a permit had been obtained.

In the performance of specifications for plumbing in a building contract for altering and putting an additional story upon a four story house in Boston, each story being a separate tenement, the work disclosed the existence of an old kitchen sink waste pipe smaller than the three inch pipe required by law for buildings of the height which this one when altered would be, and which ran where new bay windows were to be constructed. The contractor, at the request of the owner and his architect, put in a new three inch waste pipe in a place not to interfere with the bay windows, and connected the sinks with it. Before this was done, there was a discussion between the parties as to whether the new pipe would be an extra, and the architect with the consent of the defendant gave the plaintiff a written order "to proceed at once and finish plumbing according to contract, and if there is any additional cost for three inch pipe and connections, the same will be allowed." In a suit by the contractor in which he was not allowed to recover on the contract on account of his non-performance of conditions precedent, it was *held*, that the plaintiff was entitled to recover for putting in the new waste pipe and connecting the kitchen sinks with it as extra work outside of the contract. *Held*, also, that the trial judge did not err in leaving to the jury the question whether this plumbing was covered by the contract, as it was not a question of the construction of a contract, but depended upon what plumbing was in the building before the alterations were made, a question of fact for the jury. *Held*, also, that this extra work was covered by the written order, and that extrinsic evidence was competent to identify the "three inch pipe and connections" mentioned in the order.

A general exception to a portion of a judge's charge covering more than three pages of the printed record on a matter not pointed out to the judge by the excepting party is bad.

A contractor, who has altered a house under a contract requiring the work to be performed to the satisfaction of the architect of the owner, and requiring a certificate of the architect's approval before payment, may recover for items of

extra work specially ordered by the owner without the knowledge of the architect, although the architect has given no certificate of approval.

A general verdict on two counts for different causes of action one of which is good and the other bad must be set aside.

The objection that certain evidence contained in an auditor's report was inadmissible is no ground for excluding the report or for striking out those portions of it on a motion made at the trial.

CONTRACT brought in the name of the plaintiff for the benefit of the C. W. Leatherbee Lumber Company, to which the plaintiff had assigned all his claims against the defendant before the bringing of this action, upon a written building contract, dated September 6, 1898, set forth in the declaration, together with certain specifications and plans, whereby the plaintiff "under the direction and to the satisfaction of Frank M. Churchill, architect, acting for the purposes of this contract as agent" of the owner, agreed to "provide all the materials and perform all the work mentioned in the specifications and shown on the drawings" prepared by the architect for certain alterations and additions to a building owned by the defendant; with a second count upon an account annexed, for extra work done and materials furnished at the request of the defendant. Writ dated April 20, 1900.

At the trial in the Superior Court, before *Hopkins, J.*, an auditor's report was introduced in evidence. The jury returned a verdict for the plaintiff in the sum of \$530.03; and the defendant alleged exceptions to the admission of the auditor's report and to the refusal of the judge to strike out portions of it, and to certain portions of the judge's charge.

The exceptions and the matters to which they relate are stated in the opinion of the court. The only explanation required in addition is the following finding of the master in regard to a written order for three inch waste pipe given by the architect, mentioned towards the end of the third division of the opinion, namely: "I find that the parties, after some delay, determined, together with the architect, to put in a new three inch waste pipe for the sinks, and that at the defendant's request the new pipe was to be placed in the front corner of the back entry. The plaintiff contended that this new pipe would be an extra, and the defendant contended it would not be an extra. The architect, with the consent of the defendant, thereupon

gave the following order in writing to the plaintiff: 'Dec. 6, 1898. Frank Leverone, Esq., Dear Sir, — I wish you to proceed at once and finish plumbing according to contract, and if there is any additional cost for three (3) inch pipe and connections, the same will be allowed. Yours truly, F. M. Churchill, Architect. Alterations for J. Arancio, 149 North St.'"

R. W. Bartlett, for the defendant.

R. S. Bartlett, for the plaintiff.

LORING, J. 1. We are of opinion that the exception to the charge of the presiding judge, as to the plaintiff's failure to comply with the following provisions of the specifications, must be sustained: "Before any final estimate shall be allowed by the architect in charge, the contractor will be required to sign a certificate on said estimate that he will accept the same as a settlement in full for all claims against the owner on account of work done under this specification and contract. The contractor shall also sign and duly attest a statement, before final payment is made, that all claims for materials provided or labor performed on this property are paid and satisfied in full, and that there are no claims whatsoever against the owner of this property."

The presiding judge instructed the jury "as a matter of law, that it would be competent for the architect, as agent for the owner, to waive for the owner compliance with that stipulation on the part of the contractor that he would before final payment, give these certificates." Even if there was evidence on which the jury could have found that the defendant had waived these provisions and also evidence on which it could have been found that the architect was authorized to waive these provisions, it was error to instruct the jury as a matter of law that the architect could waive these provisions, and the only question was whether he had done so. The instruction, therefore, was wrong. An architect has no authority to waive an agreement by the owner as to the terms on which payment shall be made.

The provision of article 1 of the contract, that "the contractor, under the direction and to the satisfaction of F. M. Churchill, architect, acting for the purposes of this contract as agent of the said owner, shall and will provide all the materials and perform all the work mentioned in the specifications and shown on the drawings," does not go further than to make the architect the

agent of the owner in the matter of deciding whether the work done fulfilled the requirements of the specifications and drawings. Apart from an agreement to that effect an architect is not the general agent of the owner. See *McIntosh v. Hastings*, 156 Mass. 344; *Adlard v. Muldoon*, 45 Ill. 193; *Glacius v. Black*, 50 N. Y. 145. The provision in this contract did not give the architect authority to waive, in behalf of the owner, the terms on which the owner had stipulated in writing that the payments for the work were to be made when the work described had been done to the architect's satisfaction.

We are further of opinion that the contractor must fulfil the requirements of these two clauses before he can bring suit. The fair meaning of these two clauses is (1) that the last instalment shall not be due until the plaintiff agrees that that instalment will be accepted by him in full settlement of all claims against the owner on account of work done under the contract, and makes a certificate to that effect on the architect's certificate for that instalment; and (2) that the final instalment shall not be due until all claims for material provided or labor performed have been paid and satisfied in full and a written statement to that effect is made by the contractor. There was evidence that when this suit was brought there were outstanding claims for labor and materials, and there was no pretence that either the certificate or the statement mentioned above had been made.

The result is that this action was prematurely brought. Although these two provisions prevent the contractor from getting credit directly from the material men and the workmen employed by him, there is nothing to prevent his borrowing the money due them from others, and paying them off with it; if he does so, and then makes the required written statement that nothing is due for material furnished or labor performed, and also makes certificate on the architect's certificate for the final payment, that he accepts it, as stated therein, in full settlement of all claims "on account of work done under this specification and contract," he will be entitled, on proving what the jury found he proved in this case, to recover on the first count. He is entitled to recover on the second count, without making these certificates; the ground on which he is entitled to recover for that work, if he is entitled to recover for it without having got

an order from the architect for the extra work covered by that count, is that the work is done outside of the contract.

As the case must go back for a new trial, we will dispose of the other questions which have been argued. It is doubtful whether all of these questions are open to the defendant, who made no requests for rulings, but contented himself with general exceptions to different parts of the charge. But we have not stopped to consider the question whether they are open to the defendant or not.

2. The defendant's contention is not well taken that he is entitled to a claim against the plaintiff by way of recoupment for damages caused by the work being suspended for some six weeks immediately after it was begun, and for \$22 expended by him in procuring a building permit to construct the new bay windows on Fulton Street. The delay in question was caused by the fact that the permit for the construction of the new bay windows was not obtained until October 14, about six weeks after the contract was signed; the contract was signed September 6, 1898.

It appeared in evidence that a permit for a bay window "would be issued only upon a personal application by the owner of the property"; and further, there was evidence that the "defendant had applied for a bay window permit and had failed to obtain one" some time before the contract was signed, and that "he applied a second time in August, 1898, also prior to the signing of the contract, so that when the contract was signed, the bay window permit had been applied for by the defendant, and was, after some delay, obtained on October 14, 1898."

In the specifications, which are stated to be "Specification for Material and Labor Required for Alterations on Building for J. Arancio, Esq.," the following provision is made under the heading "Mason's Specifications": "Permits — All needed permits must be obtained from the proper authorities." The work of constructing the bay windows is included under this heading of "Mason's Specifications." The defendant contends that this clause makes the plaintiff liable for all damages which ensued, from the fact that the permit which had been applied for by the defendant for the second time before the contract was signed,

was not obtained until six weeks after that contract was signed, — on October 14, 1898. It is hardly necessary to say that if, by the proper construction of this provision of the specifications it is made the duty of the plaintiff to obtain the bay window permit, he has not undertaken, by agreeing to perform the work described in these specifications, to insure that the permit will be issued for a bay window without delay.

The further question of the expense of \$22 admits of some doubt; but we are of opinion that this provision does not throw upon the plaintiff the duty of obtaining the bay window permit, which must be obtained on the personal application of the owner. It may be doubted whether it goes any further than to provide that no work must be done until a permit has been obtained.

3. The next exception is to the charge of the presiding judge as to items 1, 3, and 4 of Account A, amounting to \$87.47, included in the first count; these, together with two other items, 1a and 2, amounting in all to \$101.47, being the amount of extra work which was ordered in writing by the architect and the amount of which, by the terms of the contract, was to be added to the contract price.

Items 1, 3, and 4, amounting to \$87.47, were the value of labor performed and material used in doing certain plumbing and in doing the necessary carpentering in connection with it. There was evidence that this plumbing was done under the following circumstances: Before the alterations provided for by the contract were made, the building in question was a four story house on the corner of North Street and Fulton Place in the city of Boston, each story being a separate tenement, consisting of a parlor, fronting on North Street and occupying the whole width of the building; back of that a kitchen on Fulton Place, and a bedroom on the inner wall; and back of the kitchen and the bedroom an entry which ran the full width of the building; in this entry were the stairs. The alterations provided for by the contract consisted in putting on a fifth story to the house, and in cutting out the wall on Fulton Place for the whole width of the kitchens and enlarging the kitchens by throwing out a bay window where the wall had been cut away. As the building stood before the alterations, there was a kitchen sink on

each story, standing against the inside of the outer wall of the building on Fulton Place; there was an old water closet in the entry on the first floor back of the kitchen and bedroom. The provisions of the contract as to plumbing, which are material in this connection, were as follows: "Provide and set on fourth floor closet, as shown on plan with all proper traps and vents (combination hopper and hardwood seat and covers; open work), vent pipe to be 4" iron with all proper Y branches and bends to receive drainage from all other fixtures and conductors. Vent pipe to be carried five feet above roof. Plumber is to remove sinks in the third and fourth floors and replace with same size as on second floor; also on fifth floor. Do all repairs on old plumbing." The plan showed a water closet on the fourth floor in the Fulton Place corner of the back entry, with its back against the rear partition wall of the building. There was also evidence that soon after the work under the contract began, the plaintiff put in this water closet on the fourth floor with a straight vent or waste pipe discharging into the same drain in the cellar into which the vent or waste pipe of the old water closet on the first floor discharged. The waste pipe from the sinks, before the alterations, ran down the wall on the Fulton Place side connecting with the same drain pipe in the cellar mentioned above. When the Fulton Place wall of the kitchens was cut away, the old waste pipe from the kitchen sinks was left running up through the kitchens where the new bay windows were to be. It was then discovered that this old kitchen sink waste pipe was two or two and a half inches, while the law required a three inch pipe for buildings of the height which this building, when altered, would be. After the new vent or waste pipe for the water closet on the fourth floor had been put in, and the two or two and a half inch waste pipe of the old kitchen sinks had been brought to light and left running up through where the bay window was to be after the Fulton Place outer wall had been cut away, the defendant and the architect requested the plaintiff to put in a three inch waste pipe for the sinks in the front corner of the back entry and to connect the sinks with that waste pipe. The extra work now in question was the work done in putting in this three inch waste pipe and connecting the kitchen sinks with it.

In our opinion, if the jury believed these to be the facts, the putting in of the new three inch waste pipe and connecting the kitchen sinks with it was work not covered by the contract. The defendant contends that the general provision in the specifications that the vent or waste pipe for the new water closet should have "all proper Y branches and bends to receive drainage from all other fixtures and conductors" imposed upon the contractor the duty of connecting the kitchen sinks with the four inch waste pipe of the new water closet, although these sinks had been previously connected with a waste pipe of their own which it was not stated in the contract was to be abandoned, and although the waste pipe of the water closet was separated from the sinks by the whole width of the back entry and the partition wall between the back entry and the kitchen. There is nothing in this contention.

Neither is there anything in the contention that the exception to the judge's charge must be sustained, because the judge left the construction of the written contract between the parties to the jury. The question whether this plumbing was work covered by the contract or not, really depended upon what the plumbing was in the building before the alterations were made, and that question had to be left to the jury. If the charge of the presiding judge can be construed to go beyond this, the defendant cannot avail himself of that objection. He did not point out that objection to the judge, but contented himself with the general exception to the part of the charge dealing with these three items of extras covering more than three printed pages of the record. *Barker v. Loring*, 177 Mass. 389.

We are of opinion that this work was covered by the written order, within the provisions of the contract. The written order stated that if there is any additional cost for three inch pipe and connections, the same will be allowed. It is competent to identify by parol evidence what the "three inch pipe and connections" mentioned in the written order meant. There was evidence that for item 2, "Closet on the top floor, \$5," a written order was given, "and the price of the same fixed by the architect." It is so stated in the auditor's report. The same is true of item "1a, for setting pipe underneath the floor, \$9."

4. The next exception is to the charge of the judge in respect

to the extras covered by the second count, amounting to \$35.54. There was evidence that these items had been specially ordered by the defendant without the knowledge of the architect, whereby the jury could find that the plaintiff was entitled to recover for them, although no written certificate had been given therefor, within *Bartlett v. Stanchfield*, 148 Mass. 394.

Had there been a separate verdict on this count, as there should have been, since that count was not for the same cause of action as that covered by the first count, the verdict on the second count would have stood; but a general verdict was taken on both counts, and that verdict must be set aside.

5. Before the auditor's report was read to the jury, the defendant "called the attention of the court to those provisions of the contract hereinbefore set forth, which the defendant claims constitute conditions precedent to plaintiff's right to recover, and objected to the admission and to the reading of said report to the jury"; he also called attention to the portions of the report, as hereinbefore set forth, relating to the auditor's finding on items 1, 3, and 4 on the plaintiff's account annexed, "A," and requested the court "to order stricken out of said report, all evidence contained therein relative to said items, except such evidence, if any, as tended to show that there had been additional three inch pipe and connections used in finishing the plumbing according to contract, and the value of said three inch pipe and said connections." And also "defendant's attorney called attention to those parts of said report relative to extras claimed in his account annexed B, all of which was allowed by the auditor to the plaintiff; and the defendant's attorney asked the court to order all of said parts of said report stricken out of said report." These motions were rightly refused. *Briggs v. Gilman*, 127 Mass. 530. *Collins v. Wickwire*, 162 Mass. 143. *Sullivan v. Arcand*, 165 Mass. 364. *Winthrop v. Soule*, 175 Mass. 400.

Exceptions sustained.

LESTER A. NEWCOMB & others vs. NORFOLK WESTERN
STREET RAILWAY COMPANY.

Norfolk. May 23, 1901. — September 3, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, BARKER,
HAMMOND, & LORING, JJ.

Street Railway, Restrictions imposed in grant of location.

A requirement, in a location granted under Pub. Sts. c. 118, § 7, by the selectmen of a town to a street railway company, that the company shall water the street over which it is granted a location from curb to curb between April 15 and November 15 in each year, is a lawful restriction, and will be specifically enforced in equity by this court under Pub. Sts. c. 118, § 68.

Restrictions imposed by the aldermen of cities and the selectmen of towns in granting locations to street railway companies under Pub. Sts. c. 118, § 7, are not affected by St. 1898, c. 578, relating to street railways, it being expressly provided by § 11 of that act that the companies shall remain subject to such restrictions.

PETITION by the selectmen of Dedham under Pub. Sts. c. 118, § 68, for an order compelling the Norfolk Western Street Railway Company to water High Street in that town in accordance with a restriction contained in a grant of location to the respondent, filed May 24, 1900.

The respondent demurred to the petition and the case was heard by *Lathrop, J.*, who was of the opinion that the demurrer should be overruled; and at the request of the respondent reported the case for the consideration of the full court. The respondent admitted at the hearing, that if the demurrer was overruled there was no defence to the petition on the merits, and the justice therefore reported, that, if the demurrer was overruled, an injunction was to issue in accordance with the prayer of the petition, with costs. If the demurrer was sustained, the petition was to be dismissed, with costs.

By the report it appeared, that the order of location granted by the petitioners to the respondent to lay its tracks in High Street in Dedham was granted on September 19, 1898.

Section 23 of the grant of location was as follows: "Said Company shall water said High Street from curb to curb between the fifteenth day of April and the fifteenth day of November in each year from Memorial Square to the point South of

Lowder and High Streets, where paving ceases as herein prescribed: such watering shall be done to the satisfaction of the Superintendent of Streets."

The case was submitted on briefs at the sitting of the court in January, 1901, and afterwards was submitted on briefs to all the justices.

C. A. Reed, for the petitioners.

J. J. Feely & T. E. Grover, for the respondent.

HOLMES, C. J. The requirement in § 23 of the grant of the location to the respondent that it shall water the street over a portion of the way between certain dates was a lawful restriction within Pub. Sts. c. 113, § 7, which allowed selectmen to grant a location "under such restrictions as they deem the interests of the public may require." The well-known effect of running cars is to raise a dust, and the requirement, although affirmative in form, in substance restricts the respondent to running cars in such a way as not to raise a dust. The case is not affected by St. 1898, c. 578. See § 11.

This being so, the restriction is a regulation which this court is given power to enforce by Pub. Sts. c. 113, § 63.

It is true that in St. 1866, c. 294, § 1, from which § 63 is taken, the power was given "according to the usual course of chancery proceedings," and that it might be argued that this restriction should not be enforced because it is not the usual course of chancery proceedings to compel the specific performance of continuous acts or duties for an indefinite time. *Powell Duffryn Steam Coal Co. v. Taff Vale Railway*, L. R. 9 Ch. 331. *Fry*, Sp. Perf. (3d ed.) 41, 45. *Texas & Pacific Railway v. Marshall*, 136 U. S. 393, 407. But the court is of opinion that, in view of the obvious purpose of the statute that such regulations should be enforced specifically, it ought to go further than ordinary practice might lead it to go in the absence of legislation, and to do all that it can to see that the requirement is performed. Some confirmation of this view is derived from § 27, as that section shows that regulations concerning the removal of snow and ice were before the mind of the Legislature when it enacted § 63.

Practically there will be no difficulty in the specific enforcement of the street-watering. The issue raised is not on the man-

ner of performance but on the question whether the respondent is bound to water at all. When it is decided that the respondent is bound, probably there will be no further trouble, especially as the location provides a domestic tribunal by requiring the work to be done to the satisfaction of the superintendent of streets.

Demurrer overruled; injunction to issue.

MALVINA S. NAZRO vs. NANCY L. G. LONG.

Plymouth. June 19, 1901. — September 3, 1901.

Present: HOLMES, C. J., KNOWLTON, LATHROP, BARKER, & HAMMOND, JJ.

Probate Court, Jurisdiction. Equity Jurisdiction, Equitable assignment. Real Action, Equitable defence.

The Probate Court has no jurisdiction to make a decree, under Pub. Sta. c. 142, § 1, against the administrator of a party to an agreement to convey real estate, for the specific performance of the agreement, without first giving notice to all persons interested.

A deed was given by an administrator in obedience to a decree of the Probate Court, under Pub. Sta. c. 142, § 4, for the specific performance of an agreement to convey the land. All parties acted in good faith, but the deed was void, because the decree was made without notice to persons interested. The grantee paid the purchase money in accordance with the agreement, occupied the premises for about twelve years with the knowledge of the heirs at law of the grantor's intestate and without objection from anybody, made substantial repairs and additions and paid the taxes. In a writ of entry brought by one claiming under an heir at law of the grantor's intestate, to recover the premises, it was held, that, as an equitable defence under St. 1883, c. 223, § 14, the tenant had a title in the property that would be enforced in equity, being in the position of an equitable assignee of the original contract of sale. In this case the original contract of sale ran to the husband of the tenant. Held, that the tenant's rights as equitable assignee were not affected by the marital relation.

WRIT OF ENTRY to recover certain land in Wareham, dated January 11, 1899.

The answer set forth in full the facts relied upon in defence and hereafter stated.

At the hearing in the Superior Court, before *Richardson, J.*, without a jury, it appeared, that the demanded premises were a portion of a tract of about twelve acres, formerly constituting

the farm or estate of Abijah Long of Wareham. Both demandant and tenant claimed title through Abijah Long, who had been in possession of the premises since March 24, 1845, and until he died intestate on April 17, 1885. He left a widow, Pauline Long, and as heirs at law and next of kin, two sons, Albert W. Long and Abijah C. Long, both of full age, and two minor grandchildren, daughters of a deceased daughter, Sarah; namely, the demandant, Malvina S. Mann, then aged seventeen, and married since the bringing of this action to one Henry J. Nazro, 2d, and Sarah E. L. Rogers, a younger sister. Subject to the rights of the widow and to the effect of the agreement hereafter mentioned, the legal title to the "Abijah Long Property," including the locus, was one sixth in the demandant, one sixth in Sarah E. L. Rogers, and one third each in Albert W. Long and Abijah C. Long.

On June 8, 1885, Pauline Long, widow of Abijah, was appointed administratrix of his estate, gave bond on the same day and duly published notice of her appointment. She at no time filed an account of her administration, and is long since deceased.

Albert W. Long died at Wareham on August 13, 1891, intestate, leaving a widow, Nancy L. G. Long, the tenant in this action, and two sons, Albert H. Long and John C. Long. The demandant claimed under deeds from Albert H. Long and John C. Long. The deed of Albert H. was dated November 12, 1896, confirming a former deed of July 17, 1896. The deed of John C. was dated July 25, 1898, and purported to convey the dower rights of his mother Nancy L. G. Long, which he had acquired subject to the agreement hereafter mentioned.

Shortly before his death, Abijah Long executed the following instrument: "Wareham, April 7, 1885. This is to certify that I, Abijah Long, do promise and agree in consideration of the two hundred (\$200) dollars to sell and convey to Albert Long, my son, a certain tract of land [Description]. The said Albert Long is to pay interest on the place from the time he comes into possession, and until he pays for the place, and shall pay sixty (\$60) dollars per year until the said place is paid for with interest at 4 per cent. Abijah Long, Albert W. Long, Pauline Long. Witness, Jerome H. Butler."

The demandant, for the purposes of the case, admitted that such an agreement had been made. On December 13, 1886, Albert W. Long filed in the Probate Court for the County of Plymouth a petition under Pub. Sts. c. 142, § 1, annexing thereto a copy of the foregoing instrument, and praying that a specific performance of the agreement might be decreed, and that Pauline Long, administratrix of the estate of Abijah Long, might be ordered to convey the estate to him in accordance with its terms.

On the same day *Keith, J.*, made the following decree: "On the petition of Albert W. Long of Wareham in said county praying that a specific performance of a contract for the sale of real estate to him by Abijah Long, late of said Wareham, may be decreed; it appearing that said Abijah Long did during his lifetime make an agreement to sell certain real estate to Albert W. Long described in the copy annexed to said petition. It is ordered and decreed that Pauline Long, administratrix of the estate of said Abijah Long, be ordered to convey said real estate according to the terms of said agreement."

Under and in pursuance of this decree Pauline Long, as "widow and administratrix of the estate of Abijah Long," purported to convey the locus on February 19, 1887, to the tenant "Nancy L. G. Long, wife of Albert W. Long," by a quitclaim deed, reciting the agreement and decree and the receipt of \$200 as the consideration for the conveyance.

There was no evidence tending to show that any citation was ever issued upon the above petition of Albert W. Long to the Probate Court, or that any notice, actual or constructive, was ever given to the persons interested, or that such persons or any of them ever waived in writing or otherwise the benefit of such notice, and the judge found as a fact, that no such notice was given, and that the decree was made on the same day on which the petition was filed.

At the request of the demandant, the judge ruled that the deed of February 19, 1887, conveyed no title to the tenant in and to the demanded premises, but was void, and was without legal effect. The tenant thereupon introduced evidence, under the demandant's objection that it was immaterial and incompetent, tending to show the following, which were found to be facts by

the judge: That Albert W. Long paid to Pauline Long, administratrix of the estate of Abijah Long, the consideration recited in her deed to his wife of February 19, 1887, it being the amount stipulated in the original agreement between Abijah Long and Albert W. Long; that the tenant and her husband moved into the demanded premises at or about the time of the death of Abijah Long, and have resided there until the present time without objection on the part of anybody; that they attempted to get a deed, namely, that of February 19, 1887, and thought they had got one; that the tenant's husband, shortly after Abijah Long's death, made repairs upon or additions to the house at a cost of about \$130, and that up to the time of his own death Albert W. Long paid the taxes upon the property, and that their occupancy during the whole time was known to the heirs at law of Abijah Long, including the demandant.

The demandant asked the judge to rule: 1. That these facts were not competent for the tenant under her answer, and 2. That if competent, under the answer, the facts if proved would not constitute a defence to the action.

The judge declined so to rule, but ruled that the facts relied on by the tenant as above set forth and found by him were admissible under the tenant's answer, and were an equitable defence to the demandant's claim. He found for the tenant; and at the request of the demandant, and with the consent of the tenant, reported the case for the determination of this court.

If the deed of February 19, 1887, operated to convey to the tenant title to the demanded premises, or if the facts stated and found by the judge legally constituted an equitable defence to this action, judgment was to be entered upon the finding. Otherwise, if the deed from John C. Long to the demandant of July 25, 1898, operated to convey to the demandant a one half interest in the demanded premises, judgment was to be entered for the demandant, with the damages assessed at \$1. If this deed did not operate to convey to the demandant a one half interest in the granted premises, judgment was to be entered for the demandant for an undivided half of the demanded premises, and such additional interest, if any, as the court should find passed to the demandant under this deed, with damages assessed in the sum of \$1.

C. F. Chamberlayne, for the demandant.

G. W. Stetson & N. Washburn, for the tenant.

KNOWLTON, J. We may assume in favor of the demandant that if the tenant had no rights in the property the demandant's title would be sufficiently proved by the facts stated.

The judge rightly ruled that the deed under which the tenant claims is void, because under the Pub. Sts. c. 142, § 1, the Probate Court had no jurisdiction to make the decree on which it was founded without first giving notice to persons interested. Such a notice is expressly required by the statute, and if it were not, the principles of natural justice would require it. *Pratt v. Bates*, 161 Mass. 315, 318. *Shaw v. Paine*, 12 Allen, 293. *Smith v. Rice*, 11 Mass. 507. *Chase v. Hathaway*, 14 Mass. 222, 227. *Hathaway v. Clark*, 5 Pick. 490. *Peters v. Peters*, 8 Cush. 529, 543. *Jochumsen v. Suffolk Savings Bank*, 3 Allen, 87. *Pierce v. Prescott*, 128 Mass. 140, 143, 144.

The important question in the case is whether the facts show an equitable defence under the St. 1883, c. 223, § 14. Everything relied on for this purpose is set out at length in the answer, and no question of pleading is argued.

It appears that Abijah Long who owned the demanded premises made a contract in writing with his son Albert W. to convey to him the property for the sum of \$200. He died not long afterwards without having made the conveyance, and Albert W. Long brought a petition in the Probate Court for an order that the administratrix of his estate carry out the contract. A decree in accordance with the prayer of the petition was made without notice to the persons interested, on the day on which the petition was filed. On February 19, 1887, the administratrix made a deed of the property to the tenant, who was the wife of Albert W. Long, which deed recited the original agreements and the decree of the Probate Court, and the tenant, who with her husband began to occupy the premises about the time of the death of Abijah Long, has been in possession ever since. The judge found that Albert W. Long paid the sum of \$200 to the administratrix in accordance with the agreement, that he and the tenant intended to obtain a deed of the property, and that they thought they had a valid one, that they made repairs upon or additions to the house to a substantial amount and paid

the taxes, and that their occupancy during the whole time was known to the heirs of Abijah Long and was not objected to by anybody.

Under these facts and findings the tenant has a title in the property which will be enforced by a court of equity. The evidence puts the tenant in the position of an equitable assignee of the original contract of sale. Such an assignment may be made orally. *Currier v. Howard*, 14 Gray, 511. Under the circumstances of this case the tenant's rights are not defeated by the fact that she was the wife and is now the widow of Albert W. Long.

Moreover, the case comes within the provisions of the Pub. Sts. c. 142, § 22, which give a remedy in equity when an act or proceeding of a person acting as administrator under the appointment or license of a probate court is void by reason of an irregularity or want of jurisdiction or authority of the court. It is very similar to *Nott v. Sampson Manuf. Co.* 142 Mass. 479, which sufficiently covers it as an authority.

Judgment on the finding.



WILLARD L. FRAZEE & others vs. WILLIAM B. NELSON.

Middlesex. January 25, 1901. — September 4, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

Evidence, Best and secondary. *Real Action*. *Bankruptcy Act*, Section 67 f. *Execution*, Deed to purchaser at sale, Validity of sale and levy.

A writ and an execution and the officer's return thereon, material to show the demandant's title in a real action, may be proved by certified copies without producing the originals.

A demandant in a real action claiming title under a sale on execution must prove that there was a valid judgment on which the execution issued, and the recital of the judgment in the execution is not the best or proper evidence to prove it as against a tenant who is a stranger to the proceedings on the execution, whatever might be the case if the judgment debtor were the tenant.

In this Commonwealth a certified copy from a registry of deeds is sufficient evidence of the execution of the deed of which it is a copy. A copy of a certificate of entry to foreclose comes under the same rule.

Where a deed was proved by a certified copy from the registry of deeds and a copy of a plan referred to in the deed was permitted to be used at the trial, it was

assumed that it was used to show the general locality of the premises, and thus was matter within the discretion of the presiding judge.

The effect of section 67 f of the United States bankruptcy act of 1898 is not to avoid the levies and liens therein referred to against all the world, but only as against the trustee in bankruptcy and those claiming under him, so that the property may pass to and be distributed by him among the creditors of the bankrupt.

A deed to a purchaser at a sale on execution conveying "all the right, title and interest which the said D. had, at the time when the same was attached as aforesaid," is not bad on the ground that it does not appear that there was any attachment, if earlier in the deed the right, title and interest of the debtor in certain land is spoken of as having been seized on execution.

Where all of a debtor's right, title and interest in certain land is sold on execution and a deed is given by the officer to the purchaser at the sale, it need not appear either in the officer's return or in the deed, whether the property sold was free from or subject to encumbrances.

An officer levied an execution on six different parcels of land and afterwards abandoned the levies on all the lots but one, which he sold on execution. He gave no notice before the time of the sale of the abandonment of the liens on the other lots. *Held*, that the failure to give notice of the abandonment was no ground for invalidating the sale, as it could not have operated to the prejudice of the debtor. More bidders rather than fewer would have been present in consequence of the failure to give such notice.

An obvious mistake in an officer's return on a levy of execution does not defeat the levy.

Pub. Sts. c. 172, § 46, provides that, in giving notice to a debtor of a sale of his property on execution, if the debtor does not reside within the precinct of the officer serving the execution and is not found by him therein, such officer shall send by mail post-paid a copy of the notice addressed to the debtor at his place of residence as described in the execution. An execution served by a deputy sheriff of Middlesex County described the debtor as having a usual place of business in Boston. The return of the officer showed that he made diligent search for the debtor within his precinct but was unable to find him or that he had any agent or attorney or any abode last and usual or otherwise therein, and that he sent by mail post-paid a notice of the time and place of the sale and a copy of the execution to the debtor addressed to a certain number on a certain street in South Boston, but did not state that the debtor resided at the street and number named. The debtor was present at the time and place appointed for the sale and at the successive adjournments thereof. *Seem*, that if the notice had been addressed to the debtor at Boston, without adding the street and number, it probably would have been good. *Whether*, if so, the addition of the street and number and the part of Boston would invalidate the notice, the court did not consider, as the return could be amended by stating, if that was the fact, that the debtor resided at the street and number in South Boston named.

Where an officer's return sets out that a sale on execution was adjourned from time to time by direction of the plaintiff's attorney, the court cannot say that such adjournments were not adjournments for "good cause" within the meaning of Pub. Sts. c. 172, § 80.

WRIT OF ENTRY to recover certain real estate in Reading,
dated March 9, 1900.

At the trial in the Superior Court, before *Maynard*, J., the jury returned a verdict for the demandants; and the tenant alleged exceptions, which are sufficiently stated in the opinion of the court.

Section 67 f of the United States bankruptcy act of 1898, c. 541, mentioned in the opinion and held to have no application to this case, is as follows: "That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: *Provided*, That nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a *bona fide* purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry."

J. B. Dixon, for the tenant.

E. F. McClennen, for the demandants.

MORTON, J. This is a writ of entry to recover possession of certain premises in Reading. The plea is *nul disseisin* which admits the possession of the tenant and puts the demandants to proof of their title. The case is here on the tenant's exceptions to various matters of evidence, and in regard to certain rulings that were asked for by him and refused, amongst which was one that the demandants had not made out a title and that a verdict be directed for the tenant. There was a verdict for the demandants.

The demandants claim title under a sale on an execution issued in their favor on a judgment obtained by them against one Dixon. The judgment was rendered December 27, 1897,

and the execution issued July 16, 1898, and was levied on the demanded premises on July 18, and the premises were sold at auction to the demandants September 10 after several adjournments, and a deed was duly executed and delivered to them by the sheriff.

The demandants must recover, if at all, on the strength of their own title, and not on the weakness of the tenant's title. They are bound to show whatever is necessary to make out a good title in themselves. At the trial they offered in evidence copies of the writ against Dixon, and of the execution and officer's return thereon. These were admitted subject to the tenant's exception. We think that they were rightly admitted. *Chamberlin v. Ball*, 15 Gray, 352. But there was no evidence of the judgment except that contained in the recital in the execution, and the tenant contends that, as the case stands, the title of the demandants is defective for want of proof of the judgment. The tenant is a stranger to the suit against Dixon. Proof that there was a valid judgment upon which the execution issued was a necessary link in the demandants' chain of title. Whatever might have been the case if the judgment debtor had been the tenant, we do not think that as against the present tenant the recital in the execution was sufficient proof of the judgment. It was not the best or the proper evidence of it, and for aught that appeared the judgment might have been vacated or set aside or might have been invalid for want of jurisdiction or for some other reason. See *Doe v. Murlees*, 6 M. & S. 110; *Hoffman v. Pitt*, 5 Esp. 22, 23; *Doe v. Smith*, Holt N. P. 589; 2 Stark. 199; *Fenwick v. Floyd*, 1 Har. & Gill, 172; *Cooper v. Galbraith*, 3 Wash. C. C. 546; 2 Greenl. Ev. § 316; 3 Dane Abr. 63. For this reason the exceptions must be sustained.

As some of the questions now raised may come up at another trial, (if there should be one,) we deem it proper to express our opinion on other matters to which the exceptions relate.

We think that the copies of the deeds, mortgages and assignments were rightly admitted. *Ward v. Fuller*, 15 Pick. 185. *Farwell v. Rogers*, 99 Mass. 33. *Gragg v. Learned*, 109 Mass. 167. In this State a copy from the registry of deeds is sufficient evidence of the execution of the deed of which it is a copy.

Ward v. Fuller and *Gragg v. Learned*, *ubi supra*. The copy of the certificate of entry to foreclose comes within the rule as to the admission of deeds.

As original evidence it may be doubted whether the copy of the plan was admissible; but it is suggested that it was used to show the general location of the premises. If so, that was a matter within the discretion of the presiding judge. *Paine v. Woods*, 108 Mass. 160.

This is not an action between the demandants and the trustee in bankruptcy of Dixon or any one claiming under the trustee, and the evidence that was offered of Dixon's insolvency at the time of the levy and of his subsequent adjudication as a bankrupt within four months thereafter, was immaterial. The effect of § 67 f of the United States bankruptcy act of July 1, 1898, c. 541, is not to avoid the levies and liens therein referred to against all the world but only as against the trustee in bankruptcy, and those claiming under him, so that the property may pass to and be distributed by him amongst the creditors of the bankrupt. *National Mechanics' & Traders' Bank v. Eagle Sugar Refinery*, 109 Mass. 38, and cases cited.

It is true as the tenant contends that the burden is upon the demandants to show a compliance with the statute in regard to the levy and sale on execution in all respects necessary to render a title under the levy good, and that such compliance must appear from the officer's return and cannot be shown by evidence *aliunde*. *Parker v. Abbott*, 130 Mass. 25. *Haskell v. Varina*, 111 Mass. 84. *Litchfield v. Cudworth*, 15 Pick. 23. The tenant points out various particulars in which he contends that the return fails to show that the statute has been followed and he insists that the levy and sale were therefore invalid. (1) The first objection relates more particularly to the deed given by the officer and is that the conveyance was of "all the right, title and interest which the said Jonathan B. Dixon had at the time when the same was attached as aforesaid," whereas neither in the return nor in the deed does it appear that there was any attachment. But we think it plain that what is referred to in the language quoted is the right, title and interest which is spoken of earlier in the deed as having been seized on execution. (2) The next objection is that it does not appear in the

return or deed whether the land was sold free from or subject to encumbrances. But the sale was of all the debtor's right, title and interest, and our attention has not been called to any provision in the statute which requires a statement in the return or the deed that the property sold was free from or subject to encumbrances and we know of none. (3) The tenant further objects that the return shows that the officer "levied on and sold six different parcels in Somerville, Medford and Reading, but the deed shows that he conveyed only one of them." But it appears from the return that while the officer levied on different lots in the places named he afterwards by direction of the plaintiffs' attorney abandoned the levies on all the lots except one, — the premises in suit, — and the fair construction of the return is that the sale was of that lot and no more. The fact that no notice was given of the abandonment of the levy on some of the lots could not have operated to the prejudice of the debtor. More bidders rather than fewer would have been present in consequence of the failure to give such notice. (4) The mistake in regard to the second lot is an obvious one, and does not defeat the levy. *Shove v. Dow*, 13 Mass. 529. (5) The fair import of the return is that the officer made diligent search for the debtor within his precinct but was unable to find him, or to find that he had any agent or attorney, or any abode last and usual or otherwise therein, *Owen v. Neveau*, 128 Mass. 427; *Sawyer v. Harmon*, 136 Mass. 414, and that he sent by mail postage prepaid written notice of the time and place of sale together with a copy of the execution to the debtor at the address named. "Notice of said sale" means notice of the time and place of sale. It is not stated in the return that the debtor resided at the street and number named. But the debtor was described in the execution "as of and having his usual place of business in Boston," and the place to which the notice was sent was in Boston. Pub. Sts. c. 172, § 46. Without passing upon the question whether the addition of the street and number and particular district would invalidate what otherwise probably would have been a good notice, it is sufficient, we think, to observe that the return can be amended by stating, if that was the fact, that the debtor resided at the street and number given in South Boston, and the objection avoided. The objection is

of the most technical character as the return shows that the debtor was present at the time and place appointed for the sale and at the successive adjournments thereof.

The tenant being a stranger to the proceedings under the execution, it is possible the instructions as to the effect to be given to the officer's return went too far. But no harm was done since the officer having returned that he was unable after diligent search to find the debtor in his precinct or that he had any abode therein it was immaterial whether the debtor in fact resided within his precinct or not. *Owen v. Neveau, ubi supra.* (6) The officer had power to adjourn the sale from time to time. Pub. Sts. c. 172, § 30. The return sets out that the adjournments were by direction of the plaintiff's attorney, and we cannot say that such an adjournment is not an adjournment for "good cause" within the meaning of the statute. It was not necessary that the officer should also return that he deemed the adjournments expedient. *Ela v. Yeaw*, 158 Mass. 190.

Exceptions sustained.

ELIZABETH H. PEARSON, executrix, & another, vs. ROBERT O. TREADWELL & others, trustees.

Suffolk. March 19, 1901. — September 4, 1901.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

Trust, When not terminated, Laches. *Interest. Equity Pleading and Practice*, Answer under chancery rules.

Six heirs at law and legatees of a certain testator, three of whom were the trustees under his will, made an agreement in writing containing the following: "The amount of income from said Estate which has never yet been paid to us, and which is still remaining in the hands of the Trustees of said Estate undivided, appears on the books of account of said Estate as 'undivided income account,' and is the property of us individually free and clear of any trust, in equal proportions, to wit one fifth part of said undivided income belonging to each one of us, and forms no part of said Trust Estate and shall not go to the last survivor of us, but shall be paid to each of us upon demand or to our Executors or Administrators; and if any share of said 'undivided income' as aforesaid or any other accrued income shall be paid after the decease of any one of us, it shall carry interest from the day of the death of that one of us, to be paid out of the said trust estate; the share of said G. being applied upon his promissory notes now

held by said Trustees agreeably with the terms of an agreement signed by him, dated March 8th, 1872, and now in the hands of said Trustees." Also "that the whole income from said trust estate for the year 1874 and for each and every year subsequent thereto, shall each year be paid over by the said Trustees to the person or persons entitled to receive the same by the terms of said Will"; and "that the trust Estate which shall pass to the last survivor of us shall be, and shall be limited to the capital sum which said Trustees received in trust at the death of said D. H. with the natural increase thereof, but not any income derived therefrom up to the time when the last survivor shall become entitled to the whole of said estate by the terms of said will." In a suit in equity against the trustees, to enforce the trust arising from this agreement, the trustees set up the statute of limitations. *Held*, that the effect of the agreement was not to convert the relation between the plaintiff and the trustees into that of debtor and creditor, but to provide for the execution and carrying out of the trust in accordance with the terms thus established; that the defendants were to continue to hold the property in trust and to account for it as trustees; and consequently that the claim was not barred by the statute of limitations.

An executor of a *cestui que trust* seven and a half years after his appointment brought a bill in equity against the trustees to enforce a trust arising from a written agreement in force before his appointment. The delay of the executor appeared to have been principally if not wholly due to a desire on his part to avoid litigation, some of the trustees apparently taking the ground at one time that they were not liable. *Held*, that under such circumstances laches could not be imputed to the executor.

An agreement among the heirs at law and legatees of a certain estate, that certain income of the estate should be divisible among them upon demand and should not go to the survivor of them, provided, that if any share of such income should be paid after the death of any of them, it should "carry interest from the day of the death of that one of us, to be paid out of the said trust estate." *Held*, that in the absence of any stipulation to the contrary, the rate of interest must be taken to be six per cent per annum as established by law.

Under the Chancery Rules adopted by this court in 1884 and still in force, all answers, except in case of bills for discovery, are to be treated as pleadings merely and cannot be excepted to for insufficiency. Rules 17 and 18 are to be construed as applying only to bills for discovery.

BILL IN EQUITY by Elizabeth H. Pearson, executrix under the will of William H. Treadwell, and Willard Q. Phillips, executor under the will of Emily Treadwell Phillips, against Robert O. Treadwell, George L. Treadwell and John P. Treadwell, the trustees under the will of Daniel H. Treadwell, to enforce a trust arising from an agreement in writing among the heirs at law and legatees under the will of said Daniel, including the three trustees above named, filed July 12, 1898, and amended February 10, 1899.

The agreement sought to be enforced was as follows:

"Know all Men by these Presents that we Robert O. Treadwell, William H. Treadwell, George L. Treadwell, John P.

Treadwell, and Emily T. Phillips, children and heirs at law of Daniel H. Treadwell, Esq., late of Portsmouth in the state of New Hampshire, deceased testate, being the legatees under the Will of said Daniel H. hereby mutually agree with each other —

“First, that the income from the Estate of said Daniel H. which has already been received by us, since the seventeenth day of July A. D. 1864 has been properly paid to us, and shall be severally retained by us, anything in the terms of said will to the contrary notwithstanding.

“Second, that the amount of income from said Estate which has never yet been paid to us, and which is still remaining in the hands of the Trustees of said Estate undivided, appears on the books of account of said Estate as ‘undivided income account,’ and is the property of us individually free and clear of any trust, in equal proportions, to wit one fifth part of said undivided income belonging to each one of us, and forms no part of said Trust Estate and shall not go to the last survivor of us, but shall be paid to each of us upon demand or to our Executors or Administrators; and if any share of said ‘undivided income’ as aforesaid or any other accrued income shall be paid after the decease of any one of us, it shall carry interest from the day of the death of that one of us, to be paid out of the said trust estate; the share of said Geo. L. being applied upon his promissory notes now held by said Trustees agreeably with the terms of an agreement signed by him, dated March 8th, 1872, and now in the hands of said Trustees.

“Third, that the whole income from said trust estate for the year 1874 and for each and every year subsequent thereto, shall each year be paid over by the said Trustees to the person or persons entitled to receive the same by the terms of said Will.

“Fourth, that the trust Estate which shall pass to the last survivor of us shall be, and shall be limited to the capital sum which said Trustees received in trust at the death of said Daniel H. with the natural increase thereof, but not any income derived therefrom up to the time when the last survivor shall become entitled to the whole of said estate by the terms of said will.

“Fifth, that the mortgage debt of Thirty five thousand dollars \$35000 created by said Daniel H. and secured on land purchased

of Thomas Wigglesworth, shall be paid as soon as possible, and shall be paid out of the capital sum destined for the last survivor of us as aforesaid, and not out of any income derived from said trust estate.

"This agreement shall have no binding force and effect upon our rights except it be signed by all of us above named.

"Heidelberg Decem. 10th, 1874. Robert O. Treadwell, W. H. Treadwell. Portsmouth, N. H., February 6th, 1875. Geo. L. Treadwell, John P. Treadwell. Boston, Feb. 17th, 1875. E. T. Phillips. Florence, Dec. 21st, 1874. W. Q. Phillips."

The case came on to be heard before *Lathrop, J.*, who, at the request and with the consent of the parties reserved it for the consideration of the full court upon the pleadings, a master's report, the exceptions of the defendant John P. Treadwell thereto, which the justice overruled *pro forma*, and an agreement of the parties relating to such exceptions; such decree to be entered as law and justice might require.

S. Lincoln, for John P. Treadwell.

R. W. Hale, for the plaintiffs.

MORTON, J. This is a suit to enforce an alleged trust arising out of a written agreement among the heirs at law of Daniel H. Treadwell. They are also the legatees named in his will. Daniel H. Treadwell died in 1864 and his will was duly admitted to probate in 1865. The agreement was signed by some of the parties in December, 1874, and was signed by the others and became operative and binding in 1875.

The case was referred to a master, and at the request and with the consent of the parties was reserved by the presiding justice "for the full court upon the pleadings, the master's report, the exceptions of the defendant John P. Treadwell," which were overruled *pro forma*, "and the agreement of the parties relative to such exceptions, such decree to be entered as law and justice may require."

The defendant John P. Treadwell is the only party who made any objections to the master's report or who has taken any exceptions thereto. The exceptions taken by him are numerous, but we shall confine ourselves to the matters relied on by him in his brief and at the argument, assuming that the others either have been waived or are not now insisted upon by him.

He contends in the first place that in respect to the undivided income which the trustees had in their hands and which was intermingled with the estate, the effect of the agreement was, as between Mrs. Phillips and the trustees, to convert their relation into that of debtor and creditor, and that the claim now presented by her executor in respect thereof is barred by the statute of limitations. But the effect of the agreement, it seems to us, was not to do away with the relation of trustee and *cestui que trust*, but to fix the rights of the parties as between themselves, and to provide for the execution and carrying out of the trust in accordance with the terms thus established. It is true that the agreement declares that the undivided income represented on the books of the trustees by the "undivided income account" is the property of the heirs at law "individually free and clear of any trust . . . and forms no part of said trust estate." But the object of that declaration, when considered in connection with the rest of the agreement, was, as already observed, not to convert the relation between the trustees and their *cestuis* into that of debtor and creditor, but to remove any question as to the right of the parties as between themselves and the trustees to the undivided income. It is clear, we think, that the trustees were to continue to hold in trust the property represented by the "undivided income account," and that they were to account for it as trustees. The agreement goes on to provide that interest shall be paid on it out of the trust estate, and that the share of George L. Treadwell shall be applied on his notes held by the trustees,—provisions which are inconsistent with any other relation than that of trustee and *cestui que trust*, and which manifestly contemplate a continuance of that relation in regard to the undivided income account. Further, the agreement provides for the payment by the trustees of the income of the trust estate for 1874 and for each and every year subsequent thereto, defines the trust estate which shall pass to the last survivor, and provides for the payment, evidently by the trustees, of a mortgage created by the testator out of the capital of the trust instead of out of the income. It is plain, therefore, we think, that the object of the agreement was to adjust the rights of the parties *inter sese* and that it contemplated a continuance of the trust as thus modified. The defendant John P. Tread-

well does not contend that, if the relation of trustee and *cestui que trust* existed, as we think it did, between himself and the other trustees and Mrs. Phillips, the statute of limitations operates as a bar to the claim made by the executor. But he further contends that the executor has been guilty of such laches in presenting and prosecuting his claim as will prevent a recovery. Mrs. Phillips died on April 12, 1890. Her husband, the plaintiff Phillips, was duly appointed executor of her will. It is not stated in the master's report when he was appointed but it is alleged in the bill that he was appointed in December, 1890, and this allegation is admitted in the answers of the defendants Robert O. and George L. Treadwell. The bill was filed July 12, 1898. As drawn, Pearson was the sole party plaintiff, and the executor of Mrs. Phillips was a party defendant. But it was amended in February, 1899, so as to make the executor of Mrs. Phillips a party plaintiff. The master has found that no laches were proved, and from so much of the evidence as is reported, it seems to us that the finding was correct. The delay on the part of the executor appears to have been principally, if not wholly due to a desire on his part to avoid litigation,—some of the trustees apparently taking the ground at one time, though it does not appear when, that they were not liable. We do not think that laches can be properly imputed to the executor under such circumstances.

The defendant John P. Treadwell further contends that interest should not be allowed at the rate of six per cent. But the agreement expressly provides that upon the decease of any one of the parties interest shall be paid from the day of death upon any share of the "undivided income," or accrued income to which such party would have been entitled. In the absence of any stipulation as to the rate we think that it must be held to be the rate established by law.

The plaintiff Pearson excepted to the sufficiency of the answers of Robert O. and George L. Treadwell. The exceptions were overruled by the presiding justice and the plaintiff appealed. The answers were not under oath. It was formerly provided by the rules of this court that the plaintiff might waive an answer under oath and that in such case no exception for insufficiency should be taken to such answer. Rules of

Practice in Chancery adopted January, 1870. Rule 8, 104 Mass. 570. Such seems to be the general rule of equity practice. *Sheppard v. Akers*, 1 Tenn. Ch. 326. *United States v. McLaughlin*, 24 Fed. Rep. 823. *McCormick v. Chamberlin*, 11 Paige, 548. *Smith v. McDowell*, 148 Ill. 51. *Blaisdell v. Stevens*, 16 Vt. 179. Merwin, Eq. Pl. & Pr. § 986. Dan. Ch. Pract. (6th Am. ed.) 760 n. Aldr. Eq. Pl. & Pr. 138. 1 Encyc. Pl. & Pr. 900. 1 Hoff. Ch. Pract. 240 n. See *contra*, however, *Reed v. Cumberland Ins. Co.* 9 Stew. 393, in which it is said that the decision in *McCormick v. Chamberlin*, *ubi supra*, depends on Rule 40 of the New York Court of Chancery, which provides that if an answer is not under oath the complainant cannot except to it for insufficiency. By St. 1883, c. 223, § 10, it was provided that answers to bills in equity shall not be sworn to except in cases of bills filed for discovery only. In the rules which were adopted in 1884 no distinction is made between answers which are and those which are not under oath, but it is provided that, "If the plaintiff shall except to an answer as insufficient, he shall file his exceptions," etc. Rules adopted in January, 1884. Rule 17 of Rules for the Regulation of Practice in Chancery, 136 Mass. 606. In the absence of a special rule we think that the general rule in equity practice must apply and that except in the case of answers to bills of discovery no exception will lie for insufficiency. Rule 17 above referred to and Rule 18 are to be construed as applying to cases where exceptions to answers can be taken, namely, to answers to bills of discovery, and not as applying generally to all answers. The result is, it seems to us, that except in the case of bills of discovery answers are to be treated as pleadings merely and as such the reason for allowing exceptions to them for insufficiency ceases to exist. The exceptions were therefore rightly overruled.

Decree for the plaintiffs for amounts found due by the master.

FRANK H. CHESLEY vs. NANTASKET BEACH STEAMBOAT
COMPANY.

Suffolk. March 21, 1901. — September 4, 1901.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

Negligence, Collision of vessels, Violation of statutory regulations, Contributory. Ship, Regulations in case of fog. Agency, Scope of authority.

In an action against a steamboat company to recover for injuries alleged to have been received from a steamboat of the defendant running down the plaintiff's fishing boat while at anchor, it appeared, that the plaintiff's boat was a fourteen-foot boat propelled by oars, that the plaintiff and a companion anchored their boat close to the outer edge of the channel in Hull Gut in Boston harbor, and began to fish; that there was fog or haze in the Gut at the time; that the defendant's steamboat coming through the Gut on its regular trip when not far distant from its landing place at Hull came into collision with the plaintiff's boat or passed so near it as to cause the plaintiff to jump out and receive the injuries complained of; that the steamer was running at a low rate of speed and was giving the signals and warning prescribed by the United States statutory regulations in case of fog; and that the plaintiff gave no signal and had no means on board his boat of giving any signal. The regulations provide that in fog or mist, whether by day or night, a vessel when at anchor shall, at intervals of not more than one minute, ring the bell rapidly for about five seconds, and another provision requires, that "All rafts or other water craft, not herein provided for, navigating by hand power, horse power, or by the current of the river, shall sound a blast of the fog-horn, or equivalent signal, at intervals of not more than one minute." *Held*, that on all the evidence the plaintiff was not entitled to recover, as it was impossible to say that his violation of the statutory regulation by his lack of signals did not contribute to the accident. *Seem, also*, that the plaintiff was negligent in anchoring his boat in an improper place and in doing nothing when he saw the steamboat coming, he having made no effort to cut his anchor rope or to row out of danger, and that it could not be said that anchoring his boat in an improper place did not contribute to the collision.

The statutory regulations enacted by Congress to prevent collision of vessels are to be interpreted in the same way in the common law courts of a State as they are in the courts of the United States, if the action is for a maritime tort committed upon navigable waters within the admiralty jurisdiction of the United States. These are not mere prudential regulations, but binding enactments; and, when a vessel has committed a positive breach of statute, she must show, not only that her fault probably did not contribute to the disaster, but that it could not have done so.

In an action against a steamboat company for injuries caused by a steamboat of the defendant coming into collision in a fog with a boat in which the plaintiff was fishing anchored close to the edge of the channel through a certain gut which was part of the steamer's regular course, there was evidence of a conver-

sation between the plaintiff and a wharfinger of the defendant who was on his way to strike a triangle on a point of land for the purpose of guiding the steamboat in the fog. A man in the boat with the plaintiff testified, that the plaintiff cried out to the wharfinger "Are we all right here?" and that the wharfinger said "Yes." The wharfinger testified, that the plaintiff cried out "Do you think they can see us?" and that he replied "that he thought they could, but they would n't expect anybody anchored right in the Gut." *Held*, that, whatever the conversation was, there was nothing in it which could bind the defendant, there being nothing to show that the wharfinger could give any authority to any one to anchor in the path of the approaching steamboat, or that the plaintiff had a right to rely on the wharfinger's opinion as to whether his boat could be seen.

TORT to recover for injuries alleged to have been received by the plaintiff from a steamboat of the defendant. Writ dated September 16, 1898.

At the trial in the Superior Court, before *Sherman, J.*, the jury returned a verdict for the plaintiff in the sum of \$3,000; and the defendant alleged exceptions.

The defendant's first, third and sixth requests for rulings, which were refused by the judge, and which the court now holds should have been given, were as follows: 1. Upon all the evidence the plaintiff is not entitled to recover. 3. Unless the plaintiff, directly before and up to the time of the accident, sounded a fog horn or equivalent signal at intervals of not more than one minute, he was at fault and cannot recover. 6. Unless the jury find that the failure of the plaintiff to give the required fog signals could not have contributed to the accident, the plaintiff is not entitled to recover.

The instructions given by the judge are made immaterial by the decision of the court.

R. W. Nason, for the defendant.

W. H. Baker, for the plaintiff.

LATHROP, J. The essential facts in this case may be briefly stated. On July 30, 1898, at a quarter past seven in the morning, the plaintiff and one Schlimper went out fishing in a fourteen-foot boat propelled by oars, in that part of Boston Harbor known as Hull Gut. They anchored their boat close to the outside edge of the channel, at a point estimated by different witnesses as from seventy to two hundred feet from the shore, and began to fish. There was fog or haze in the Gut at the time. The defendant's steamboat Governor Andrew, coming through the Gut on its regular trip from Boston to Pemberton and Nan-

tasket, and when not far distant from the wharf at Pemberton either came into collision with the plaintiff's boat or passed so near it, that the plaintiff and his companion jumped into the water, and the plaintiff received the injuries complained of. The steamboat was going at a low rate of speed and was giving the signals and warning prescribed by the regulations in case of fog, and the plaintiff gave no signal, and had no means of giving any signal on board his boat.

The plaintiff lived on an island near by; was entirely familiar with the locality, and had been captain of one vessel and mate of another. Why he should anchor in a small rowboat close to the edge of the channel where he knew the steamboat must go, is not easy to ascertain. The U. S. St. of June 7, 1897, being c. 4, of the acts of that year, was put in evidence by the plaintiff and applies to this case, the place where the accident occurred being an inland water connected with the high seas. Article 15 provides: "In fog, mist, falling snow, or heavy rain-storms, whether by day or night, the signals described in this article shall be used as follows, namely." Then follow various provisions for vessels under way and at anchor, and among them is this one: "A vessel when at anchor shall, at intervals, of not more than one minute, ring the bell rapidly for about five seconds." There is another provision which reads as follows: "All rafts or other water craft, not herein provided for, navigating by hand power, horse power, or by the current of the river, shall sound a blast of the fog-horn, or equivalent signal, at intervals of not more than one minute."

There can be no doubt that the statutory regulations enacted by Congress to prevent collisions are to be interpreted in the same way in the common law courts of a State as they are in the courts of the United States, if the action is for a maritime tort committed upon navigable waters, within the admiralty jurisdiction of the United States; and that the judgment of the State court may be revised by the Supreme Court of the United States. *Belden v. Chase*, 150 U. S. 674, 691.

The rules enacted by Congress, or by supervising inspectors, authorized by Congress to establish rules, are, in the language of Chief Justice Fuller, in *Belden v. Chase*, "not mere prudential regulations, but binding enactments, obligatory from the

time that the necessity for precaution begins, and continuing so long as the means and opportunity to avoid the danger remains." 150 U. S. 674, 698. So also it was said: "And it is the settled rule in this court that when a vessel has committed a positive breach of statute, she must show not only that probably her fault did not contribute to the disaster, but that it could not have done so." 150 U. S. 699. See also *The Pennsylvania*, 19 Wall. 125, 126; *The Martello*, 153 U. S. 64; *The Britannia*, 153 U. S. 130, 143; *The H. F. Dimock*, 77 Fed. Rep. 226, 230, and 23 C. C. A. 123; *The Glendale*, 81 Fed. Rep. 633, 640; *Donnell v. Boston Tow Boat Co.* 89 Fed. Rep. 757, 762; *The Benjamin A. Van Brunt*, 98 Fed. Rep. 181; *The Providence*, 98 Fed. Rep. 133.

In *Belden v. Chase*, *ubi supra*, the judgment of the court below was reversed for the reason among others that the judge who charged the jury left it to them to decide whether those who were in the management of the respective boats were guilty of negligence or not, and whether or not they did or omitted to do that which persons of ordinary care ought to have done, and thereby, to quote the language of Chief Justice Fuller, "the obligatory force of the rules of navigation was substantially ignored." 150 U. S. 702, 703.

It is very clear that if the case at bar should have been submitted to the jury it should have gone to them under instructions very different from those which were given. The instructions given were open to the same objections as those pointed out in *Belden v. Chase*, *ubi supra*. It is also clear that the sixth request should have been given. But we are of opinion that upon all the evidence the plaintiff was not entitled to recover, and that the first request should have been given. There is no conflict of evidence upon the question whether there was a fog or haze. The only conflict is upon the question of the density of the fog. But the rule which the plaintiff violated was passed to obviate the necessity of considering the density of the fog. So, too, it is impossible to say that the lack of signals from the plaintiff's boat did not contribute to the accident, there being a fog more or less dense, lying near the surface of the water.

Moreover it would seem that the plaintiff on his own story was guilty of negligence in anchoring his boat in an improper

place; and in doing nothing when he saw the steamboat coming a quarter of a mile off. Though he was anchored he had fifty feet of rope out, but he made no effort to cut the rope or to row out of danger. If a vessel is anchored in an improper place, and is run into in a fog, it cannot be said that the fact of her being so anchored did not contribute to the collision. *The Ailsa*, 76 Fed. Rep. 868. *La Bourgogne*, 30 C. C. A. 203, and 86 Fed. Rep. 475. *The Providence*, 98 Fed. Rep. 133.

Some reliance was placed by the plaintiff upon a conversation between him and one Sirovich, the wharfinger of the defendant company, while the latter was on his way to strike a triangle on Windmill Point for the purpose of guiding the steamboat when in a fog. The man in the boat with the plaintiff testified that the plaintiff cried out to Sirovich "Are we all right here?" and that Sirovich said "Yes." Sirovich testified that the plaintiff cried out, "Do you think they can see us?" and that he replied "that he thought they could, but they would n't expect anybody anchored right in the Gut." Whatever the conversation was, there was nothing in it which could bind the defendant. There was nothing to show that Sirovich could give any authority to any one to anchor in the path of the approaching steamboat, or that the plaintiff had a right to rely on Sirovich's opinion as to whether the boat could be seen.

In the view we have taken of the case, it is unnecessary to consider whether there was any evidence of negligence on the part of the steamboat.

Exceptions sustained.

JOHN J. CADIGAN vs. LOTTA M. CRABTREE.

Suffolk. January 10, 1901. — September 5, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

Agency, Broker's commission.

Where the owner of real estate employs a broker to bring him an offer for the purchase of it without naming a price, there can be no implied agreement that the broker is entitled to a reasonable time in which to procure an acceptable offer, and the owner has a right to dismiss the broker at any time.

A real estate broker who has not been successful in procuring a customer for his principal is never entitled to recover on a *quantum meruit* for work done. If his work was in fact the efficient and predominating cause of a sale concluded by another, or if the principal is unable or refuses to sell to a customer furnished by the broker in accordance with the terms of the offer, the broker is entitled to his commission; otherwise, to nothing at all.

In an action by a real estate broker to recover a commission, it appeared, that the plaintiff was employed by the defendant, to procure a lessee for a certain hotel, and knowing the terms then acceptable to the defendant the plaintiff conducted negotiations with G. and P. on the matter, satisfying himself that they were willing to comply with the defendant's terms but getting no offer from them. The defendant then changed his mind and said he had decided not to let the hotel. Thereupon the plaintiff told the defendant that G. and P. were ready to take the hotel on the terms hitherto asked. Later the defendant dismissed the plaintiff and employed another broker who let the hotel to G. and P. substantially on the terms previously named. The jury were instructed, that if at the time the defendant changed his mind the plaintiff had gone so far in his negotiations with G. and P. that they had agreed to take a lease of the hotel on the terms named, and the defendant on being told of this had declined to let the hotel and afterwards had made substantially the same trade with G. and P. through another broker, the plaintiff could recover his commission. *Held*, that, if there had been any evidence to go to the jury that G. and P. had agreed to take a lease of the hotel on the terms named, there would have been no error in these instructions, but, there being no such evidence, an exception to the instructions was sustained. On the evidence, all that the jury would have been warranted in finding was that G. and P. were believed by the plaintiff to be ready to take the hotel on the terms named but that they never made an offer to that effect. *Whether* the plaintiff under different instructions could have recovered a commission without proving that G. and P. made an offer to take the hotel on the terms named, the court did not decide.

CONTRACT to recover a commission for services as a real estate broker, in negotiating a lease of certain property of the defendant in Boston known as the Hotel Reynolds, and in procuring purchasers for that property and an adjacent property

known as the Park Theatre, to whom the defendant refused to sell when offered the price agreed upon. Writ in the Supreme Judicial Court dated July 29, 1899.

The declaration as amended contained six counts. The first count alleged that the plaintiff procured a customer to purchase from the defendant the Hotel Reynolds and the Park Theatre for an agreed price of \$800,000, but that the defendant refused to carry out the terms of the sale or to convey the property, and that the plaintiff thereby earned a commission of \$8,000. The second count was for the same cause of action stated in an account annexed. The third count alleged that the defendant employed the plaintiff to procure a tenant for the property in question, and that the plaintiff at once undertook negotiations in her behalf for the leasing of the property, and that on or about January 1, 1899, he procured a tenant for the property at an agreed rental, but that the defendant wholly neglected and refused to carry out the agreement, and thereafter made a lease of the property to the same person through another real estate broker; and that the plaintiff thereby earned his commission upon the leasing of the property, which amounted to \$2,750. The fourth count was upon an account annexed, for \$2,750 as a commission upon the lease of the property, and for interest thereon from January 1, 1898, to the date of the writ. The fifth count alleged that on or about October 1, 1898, the defendant employed the plaintiff to negotiate for her a sale of the properties known as the Park Theatre and the Hotel Reynolds; that the defendant gave to the plaintiff the exclusive right to negotiate the sale of those properties, it being thereby impliedly agreed and understood as a condition of the employment that the properties should be sold at a reasonable price and should remain in his hands as broker, exclusively, for a reasonable time, in order to enable the plaintiff to negotiate and effect a sale thereof; that thereafter the plaintiff expended a large amount of time and money in advertising and in obtaining customers therefor; that while the plaintiff was negotiating with customers for the purchase of the property at the price of \$815,000, the sale price at which it was placed in the plaintiff's hands, and before the plaintiff had a reasonable opportunity to effect and carry out the sale at that price, the defendant noti-

fied the plaintiff that she would not sell the property at that price, and thereupon established a new price of \$1,100,000 for the sale of the property, and notified the plaintiff thereof. Whereby, by the defendant's refusal to carry out the terms of her agreement with the plaintiff, the plaintiff was unable to effect and completely carry out the sale which he was negotiating. That thereafter the plaintiff's exclusive services as broker were continued in an attempt to sell the property at the price of \$1,100,000; that thereafter, the defendant being made to understand that the price of \$1,100,000 was ridiculously excessive, again continued the exclusive services of the plaintiff as broker in an attempt to accomplish a sale of the property at \$850,000 net; that while the plaintiff was negotiating the sale of the property to various parties, and before he had had a reasonable time to effect and complete a sale of the same at the price of \$850,000 net, the defendant, entirely without excuse, and in violation of her contract of employment with the plaintiff, notified the plaintiff that she thereby withdrew the property from the hands of the plaintiff, and placed it in the hands of another broker. Whereby the negotiations of the plaintiff with various customers being interrupted, and the sale being prevented by the actions of the defendant, in violation of her agreement of employment with the plaintiff as a broker, the plaintiff became entitled to the sum of \$8,000 as compensation for his services as broker, rendered at the request of the defendant, the money paid by him for advertising already having been repaid to him by the defendant. The sixth count was on an account annexed for \$8,000 for services rendered under a contract of employment as broker for the sale of the Park Theatre and the Hotel Reynolds.

At the trial before *Morton, J.*, the first and second counts were stricken out with the consent of the plaintiff's counsel. The justice against the exception of the plaintiff ordered a verdict for the defendant on the fifth and sixth counts, and against the exception of the defendant submitted the case to the jury on the third and fourth counts.

The jury returned a general verdict for the plaintiff in the sum of \$2,847.38. Both the plaintiff and the defendant alleged exceptions.

The evidence is sufficiently stated in the opinion of the court except upon the defendant's exception, sustained by the court, to the refusal of the justice to direct a verdict for the defendant on the fourth count. The following extract from the cross-examination of the plaintiff is material under this exception upon the question, whether there was any evidence that, at the time the defendant had changed her mind and refused to let the Hotel Reynolds, the plaintiff had received from Gould and Pollo or communicated to the defendant an offer made by them to take the Hotel Reynolds on the terms of the Mann lease :

" Q. Did you ever get any offer from Gould and Pollo for that property [the Hotel Reynolds] ? A. No, because I gave them the terms at that time, the same terms given to Mann, and just at that time Miss Crabtree said she would not do anything about the property. — Q. Then I understand you never got from them any offer of what they would give ? A. No. They always talked about hiring it on the same plan that Mann was to hire it on. — Q. And did you ever communicate to Miss Crabtree or to Mr. Gilman [the defendant's agent] any offer of Gould and Pollo, — did you ever communicate any offer of theirs ? A. No, sir. — Q. You never had any to communicate, did you ? A. No, sir, there was n't any offer to be made. — Q. Do you remember this : do you remember that Mr. Gould told you that he might give \$25,000 a year for the property if the owner would spend \$30,000 in repairs ? A. Yes, sir. — Q. And you remember he said, ' You understand that is not an offer ' ? A. Yes, sir. — Q. When did he make that suggestion to you ? A. I think that was in December ; I am not sure about it now. — Q. That is the only suggestion of an offer ever made by Gould and Pollo, was it not ? A. That was not an offer. — Q. Did you ever state or communicate to Miss Crabtree that Mr. Gould might give \$25,000 a year, if she would spend \$30,000 ? A. No, I never made that proposition. — Q. Did you ever make that proposition in any form to Miss Crabtree or to Mr. Gilman ? A. Yes, sir. I called on January 2, 1899, at five o'clock, and saw Miss Crabtree at the Adams House ; she said she was going away and would do nothing about letting the Reynolds until she came back. I told her Mr. Gould would like to hire it, and also Mr. Kraft. That is a memorandum I

made shortly after coming back from the Adams House. — *Q.* What is the memorandum? *A.* That is in my diary in the office. — *Q.* You mean you copied this from your diary? *A.* Yes, sir. — *Q.* There is nothing there telling Miss Crabtree what they would give? *A.* There was no question of what they would give; they would have to take it at her terms or not get it. — *Q.* That is what I ask you, if you made any suggestions? *A.* They were ready to take it on the terms. — *Q.* I ask you if you gave her any idea at that interview of what they would give? *A.* No. They were ready to hire the hotel on the terms already talked about. That is the way I understood it. — *Q.* Did you ever tell her, or tell Mr. Gilman, — name any figure that Gould and Pollo said they might give? *A.* No, except that they would like to hire the hotel."

The plaintiff further testified, on cross-examination, that on November 23, 1898, he wrote a letter to Mr. Gilman, stating that he had a tenant for the Hotel Reynolds who would pay \$25,000 a year rent, the owner to make repairs and any necessary alterations. [It had appeared by other evidence that this offer had been refused by the defendant.] The plaintiff then testified as follows: "The party that I was speaking of in that letter, and whom I did not name, was Mr. Gould. — *Q.* And that is the only proposition that you made to Miss Crabtree, and it is only through her attorney, as to what Mr. Gould might do, is it not? *A.* That is the only direct proposition."

Later the plaintiff testified, as follows: "*A.* He [Gould] always intimated to me that he would hire it if he could get it, when she decided to rent it. — *Q.* You were going in there from time to time to get your supper, and he would ask you if there was anything new? *A.* Yes. — *Q.* And you did not try to do anything about leasing that property to Gould and Pollo after the first of January, no more than to go in and get your supper, and ask if there was anything new? *A.* Nothing. They were ready to hire when Miss Crabtree was ready to let it, and I kept writing her to know if she would let it."

On re-direct examination, the plaintiff testified: "I never submitted any offer other than that of \$25,000 a year to Miss Crabtree or Mr. Gilman. The proposition of Mr. Mann was substantially that of the terms stated in the lease to Gould

and Pollo. I told Gould and Pollo that those were the terms, \$25,000 for the first five years and \$30,000 for the second five years, and the lessor to spend \$35,000 in alterations and repairs, and to get six per cent interest on the \$35,000. After the Mann lease fell through I saw Gould and Pollo that same night. They started right in to look up the details of lease. I told them the terms of the Mann lease. On January 2, I told Miss Crabtree at the Adams House that I had Gould and Pollo and also Mr. Kraft who would like to hire the hotel. She said she was tired and was going away, and would not take the matter up until she came back. I told her they were ready to hire on the same terms as the Mann lease."

S. L. Whipple, for the plaintiff.

F. Paul, for the defendant.

LORING, J. 1. The presiding justice was right in directing a verdict for the defendant on the fifth and sixth counts.

There was no evidence which would have warranted a verdict for the plaintiff. The most that could have been found in favor of the plaintiff was that the defendant employed him as a broker, in September, 1898, to find for her a purchaser for the Hotel Reynolds and that it was then stated that he was the only broker in the matter. The plaintiff's employment in the matter was brought about by one Gilman, the agent in Boston of the defendant, who did not live in that city. The plaintiff testified that Gilman "said that he thought that Miss Crabtree, from his conversation with her, would sell the property for \$800,000. Under a suggestion that I ask \$815,000, I started out." The plaintiff got several offers; one for \$750,000 in cash, and another for \$750,000, part in cash and part in "other property in trade." These offers were reported to the defendant personally between November 7 and November 11 of the same year, and were refused. The defendant then fixed her price at \$1,100,000, which the plaintiff testified "practically stopped the negotiations." On February 25, 1899, the defendant notified the plaintiff that she was willing to take \$850,000 for the property; but on March 1 following she revoked the plaintiff's authority to sell the estate at all, and notified him that she had put the property in the hands of another broker for sale, to the exclusion of the plaintiff and every one else.

No sale of the property has been made. It appears that the defendant has paid the plaintiff the amount he was out of pocket in the matter.

The plaintiff's contention is that he is entitled to recover damages from the defendant for preventing him from earning a commission by finding a person who would buy the estate, and on the ground that he was entitled to a reasonable time in which to find a customer and his authority to do so was revoked before that time had passed.

Until February 25, when the defendant put a price upon the property, it is plain that the defendant could revoke the plaintiff's employment without coming under any liability to the plaintiff for so doing. We take February 25, as the date when a price was put upon the property because the plaintiff's contention was that the price of \$1,100,000 put upon the property in the early part of November could not seriously be regarded as a price that could be obtained for the property. Where the owner of property employs a broker to bring him an offer for the purchase of it, without naming a price at which he is willing to sell, — that is to say, where the owner of property employs a broker to bring him an offer which he is to pass upon after it is brought to him, — there can be no implied agreement or understanding that the broker is to be entitled to a reasonable time in which to procure such an offer; in such a case, the owner has a right to reject every offer brought to him, as was held in *Walker v. Tirrell*, 101 Mass. 257; and it is plain that under those circumstances he could decide not to accept any offer and to dismiss the broker altogether. But the right of an owner to put an end to the broker's employment is based on a consideration which goes deeper than that, and includes the case where a price is named by the owner at which he is willing to sell his property. That consideration is the nature of a brokerage commission; the very essence of a brokerage commission is that it is dependent upon success and that it is in no way dependent upon, or affected by, the amount of work done by the broker. A brokerage commission is earned if the broker, without devoting much, or any, time to hunting up a customer, succeeds in procuring one; and it is equally true, on the other hand, not only that no commission is earned if a broker is not successful, but a

broker is not entitled to any compensation, no matter how much time he has devoted to finding a customer, provided a customer is not found. See in this connection *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 876, 888. The promise to pay a brokerage commission if a customer is found to purchase at a stated price is not the ordinary employment of labor, but is more in the nature of an offer, namely, an offer to pay a commission if a person is produced who buys at the price named; and, like any other offer, it can be withdrawn at any time, without regard to the fact that work has been done by a person in reliance on it, provided the work done has not brought the person within the terms of the offer. A broker who has not been successful in procuring a customer for his principal is never entitled to recover on a *quantum meruit* for work done. Where a broker has done work, but another broker has closed the trade, it was held that under the peculiar circumstances of *Dowling v. Morrill*, 165 Mass. 491, not that he could recover on a *quantum meruit* for work done, but that a commission was earned if his work was in fact the efficient and predominating cause of the sale; and so, where a customer is found to purchase property but the trade is not made or is not carried through because the broker's principal is not able, or does not choose, to convey the property for which he employed the broker to find a purchaser, it is now settled that the broker's remedy is to sue his principal for a commission, and that in such an action he can recover his commission; see *Fitzpatrick v. Gilson*, 176 Mass. 477, and cases there cited; although at one time countenance was given to the proposition that in such a case the remedy of the broker was on a *quantum meruit* for work done. See *Drury v. Newman*, 99 Mass. 256, 258; also *Walker v. Tirrell*, 101 Mass. 257, 258, citing with approval *Prickett v. Badger*, 1 C. B. (N. S.) 296.

2. The defendant's exception to the refusal of the justice to direct a verdict for the defendant upon the fourth count must be sustained.

It appears that on or about November 2, 1898, the plaintiff was asked, as a broker, to find a tenant for the Hotel Reynolds, the property which he had been trying to sell for the defendant in the two previous months of September and October. The hotel was then under lease to one Reynolds, and that lease

apparently ran out on January 1, 1899. In the latter part of November the plaintiff brought the matter to the attention of Gould and Pollo. Gould and Pollo then suggested that they might take a lease at \$25,000 a year, the hotel being put in running order at the expense of the lessor. This was rejected by the defendant. Later the plaintiff secured a proposal from one Mann to take a lease of the hotel; this was accepted by the defendant, and a lease was drawn up; this lease, however, fell through on December 20, 1898, for some reason not disclosed. The terms of this lease were \$25,000 for the first five years and \$30,000 for the next five years, the lessor to lay out \$35,000 in repairs and alterations and to receive six per cent interest on that expenditure. On December 22 or 23, a few days after the negotiations for the Mann lease had fallen through, the plaintiff again approached Gould and Pollo on the subject, and they came to his office and saw there some plans of the hotel sent to the plaintiff's office by Mr. Gilman, the defendant's agent, for that purpose. We understand that these plans were plans showing the alterations to be made in the hotel under the Mann lease. Gould and Pollo were then told by the plaintiff what the terms of the Mann lease were. On December 29, acting under instructions from the defendant, the defendant's agent, Gilman, directed the plaintiff to take down his sign, which was then hanging in the window of the hotel, as the defendant had decided to sell the property "if it took a year or even more than a year to do it." On January 2, 1899, the plaintiff called on the defendant at a hotel in Boston where she was then stopping, but "she said she was going away, and would do nothing about letting the Reynolds until she got back." She then left Boston and did not return until after the conclusion of the matters which gave rise to this litigation. On February 8, she wrote the plaintiff that the hotel was "for sale only"; and there was evidence that this was in answer to an inquiry from the plaintiff about letting it. On March 8, the defendant notified the plaintiff, in writing, that she had decided not to sell the hotel, and had placed it in the hands of one Fitzpatrick to be let, and added that he was her "sole agent, and he only has authority to negotiate for me." On March 12, Fitzpatrick took Gould to New York, and in an interview then had between Gould and the defendant a lease

from the defendant to Gould and Pollo was agreed upon. This was a lease for ten years, the lessee paying \$25,000 a year for the first five years, and \$30,000 a year for the second five years, the lessor putting in the necessary plumbing and doing outside repairs. It appeared that the plumbing cost about \$15,000, and that about \$75,000 was voluntarily spent by Gould and Pollo, the lessees, in alterations and repairs.

The presiding justice instructed the jury that in order to recover the plaintiff must satisfy them that on January 2, 1899, when the defendant changed her mind and decided not to lease the hotel, the plaintiff had gone so far in his negotiations with Gould and Pollo that they had agreed to take a lease of the hotel on the terms of the Mann lease, and that Miss Crabtree, on being told of that, had elected not to lease the hotel to them and afterwards had made substantially the same trade with them through another broker; but, on the other hand, if, on the second of January, when she notified him (the plaintiff) that she was not going any further with the thing, — if, at that time, negotiations had not reached such a stage as to constitute an agreement on the part of Gould and Pollo to take that property on substantially the same terms on which it was afterwards leased by her through the agency of Fitzpatrick, then the plaintiff has not made out his case, and he was not entitled to recover. In addition to this, the jury were distinctly told that if the plaintiff failed to get Gould and Pollo to take a lease and afterwards Fitzpatrick succeeded in procuring a lease from them, the plaintiff was not entitled to a commission.

We are of opinion that the Mann lease and the Gould and Pollo lease were not so far different one from the other as to prevent the plaintiff from recovering a commission if his services resulted in an offer from Gould and Pollo to take a lease on the terms of the Mann lease; we are also of opinion that, if the jury were satisfied that the plaintiff was the efficient cause of the lease to Gould and Pollo, they were justified in finding that the plaintiff's services brought the mind of the lessees to accept the terms finally agreed upon. Had there been any evidence to go to the jury that Gould and Pollo had agreed to take a lease of the hotel on the terms of the Mann lease prior to January 2, there would have been no error in these instructions;

but we are of opinion that there was no evidence on which the jury were warranted in finding that the negotiations between the plaintiff and Gould and Pollo had gone so far as to result in an agreement on the part of Gould and Pollo to take the hotel on the terms of the Mann lease before January 2.

Before disposing of this matter, we will deal with the rulings set forth in the twelfth and thirteenth requests made by the defendant. In those requests, the defendant asked the court to rule, in substance, that to recover on the third count the plaintiff had to prove that he procured an offer from Gould and Pollo in January to lease the hotel on terms fixed by the defendant, but that the defendant did not avail herself of that offer. This ruling the court refused to give, and instructed the jury that if the plaintiff procured an offer from Gould and Pollo to lease the hotel in January, and the defendant subsequently leased the hotel to them through another broker in March, on substantially the same terms, they might find that the plaintiff was the efficient cause of the lease which was made, and if they so found they might render a verdict for the plaintiff on the third count. This was wrong. The case stated in the third count is a different case from that put in by the plaintiff under the fourth count. The difference between the two cases is that in the first case the plaintiff was entitled to his commission on submitting the offer in January; in the second case, he was not entitled to a commission until the lease was made in March. The ground of recovery in the first case is that the broker procured a customer on the terms fixed by the defendant; in such a case, he earns a commission even though the defendant neglects to avail herself of the bargain which has been secured by the broker. *Fitzpatrick v. Gilson*, 176 Mass. 477. The ground of recovery in the second case is that the offer procured in January did not, of itself, entitle the plaintiff to a commission because the defendant had not then fixed the terms on which she would lease the hotel, and the commission was not earned until the defendant availed herself of the plaintiff's services by closing a trade through another broker in March, on substantially the terms of the January offer. The issues in the two cases are quite different. The presiding justice ruled that the plaintiff was not entitled to recover on either count unless he proved

that he was the efficient cause of the lease which was made in March. This was, in effect, a ruling that the plaintiff had not made out the case set forth in his third count.

We are of opinion that under the defendant's general request that there was no evidence to go to the jury on the fourth count, it is open to her to contend that even if it was not necessary for the plaintiff, in order to maintain the action set forth in that count, to prove that Gould and Pollo made an offer to take the hotel on the terms of the Mann lease (upon which we express no opinion), yet, inasmuch as the presiding justice ruled that unless the plaintiff proved that such an offer had been made he had not made out his case, if there was no evidence that such an offer had been made, the defendant is entitled to have her general exception sustained.

On a fair construction of the testimony set forth in the bill of exceptions, the jury were not warranted in finding that such an offer had been made. On the direct examination, the plaintiff testified that "Mr. Gould was very anxious at the time to hire the hotel." When asked by his own attorney as to what was said at that time, he testified: "They were ready to talk and do business; they came down and looked the plans over." The defendant's attorney at that point interrupted the plaintiff's examination with the question, "What did they say?" and the plaintiff answered, "They were ready to take the hotel, from what they talked with me. I told Miss Crabtree that I had talked with them, and that they were anxious to get the hotel. She said she was tired out and was going to New York, and would not do anything about it until she came back. That was about January 2, 1899." On cross-examination the plaintiff testified, in answer to the question, "Did you ever get any offer from Gould and Pollo for that property?" — "No, because I gave them the terms at that time, the same terms given to Mann, and just at that time Miss Crabtree said she would not do anything about the property." He also testified on cross-examination that he never got from Gould and Pollo any offer and never communicated to Miss Crabtree or to Mr. Gilman any offer from Gould and Pollo, and that "they always talked about hiring it on the same plan that Mann hired it on." This testimony falls short of proving an offer to take the hotel on

the terms of the Mann lease, and there is nothing in the rest of the cross-examination which brings this testimony up to being evidence of that fact. On re-direct examination, the plaintiff testified: "I told her [Miss Crabtree] they were ready to hire on the same terms as the Mann lease."

On a fair construction of this testimony as a whole, we are of opinion that the jury were not warranted in finding that Gould and Pollo offered to take the hotel before January 2, on the terms of the Mann lease. The jury were justified in finding that the plaintiff told the defendant that Gould and Pollo were ready to take the hotel on those terms; but taking into account the refusal of the plaintiff to testify that any such offer was made, when he was asked on direct examination what was said by Gould and Pollo to him, and taking into account the explicit statement on cross-examination that no direct proposition was ever made by Gould and Pollo, we think that all the jury would have been justified in finding was that Gould and Pollo were believed by him to be ready to take the hotel on the terms of the Mann lease, but that they never said so and never made an offer to that effect.

Exceptions to the ruling on the fifth and sixth counts overruled; exception to the ruling on the fourth count sustained.

JOHN H. HARRINGTON vs. CHARLES J. GLIDDEN, trustee.

Middlesex. March 18, 1901. — September 5, 1901.

Present: HOLMES, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Statutory Remedy. Tax, Abatement exclusive remedy for overvaluation, Description of property assessed, Limitation of action by collector. *Limitations, Statute of Constitutional Law.*

Where a new right is created by statute which at the same time provides a remedy for any infringement of it, that remedy must be pursued. Quoted with approval from *Osborn v. Danvers*, 6 Pick. 98, 99.

Where a tax is for a legal purpose and the assessors have jurisdiction and proceed

in accordance with the statutes, their decision as to the nature and amount of the taxable property of a person who has not brought in a list under Pub. Sta. c. 11, § 72, cannot be attacked in any collateral proceeding, and can be changed only in a proceeding under the statute for an abatement.

A resident of a certain city, who had taxable personal property there in his individual name and also had in his name as trustee for a New York corporation of which he was a director certain shares of corporations organized in other States, was assessed and taxed both on the property held by him as an individual and on that held as trustee. He presented no sworn list of his individual property, but, several months after the warrant had been committed to the collector, filed a sworn statement purporting to relate only to the property held by him as trustee, alleging that he had as trustee no property in his hands liable to taxation. In an action brought against him as trustee to recover the tax, the jury found that the assessors "ascertained as nearly as possible the particulars of the personal estate held by the defendant as trustee for the purposes of making this assessment," and that "having obtained those particulars they estimated such property at its just value according to their best information and belief." The court being of opinion that the evidence fully justified the findings of the jury, *held*, that the defendant could not question the valuation of the assessors, his grievance, if any, being one of overvaluation for which his only remedy was by the statutory proceeding for an abatement.

Under Pub. Sta. c. 11, § 41, which requires assessors to ascertain as nearly as possible the particulars of the estate of any person who has not brought in a list as required by them, and to make an estimate thereof at its just value, according to their best information and belief, an objection, that the description of the personal property assessed is insufficient, is not tenable.

Under St. 1889, c. 834, § 7, which provides, that if a tax remains unpaid for three months after it is committed to the collector, he may sue in his own name to collect it, the statute of limitations does not begin to run until the expiration of the three months, as the collector has no right of action except that given him by the statute.

The statutes of this Commonwealth relating to the assessment of taxes are not unconstitutional because they do not give the party assessed an opportunity to be heard. He has a full opportunity to be heard before the assessing board, if he desires it, before the demand becomes conclusive against him, and that is enough.

CONTRACT by the collector of taxes of the city of Lowell to recover the sum of \$2,576 and interest alleged to be a legal tax for the year 1889 upon the defendant, as trustee, he being a resident and inhabitant of that city. Writ dated July 6, 1895.

At the trial in the Superior Court, before *Hardy, J.*, the plaintiff introduced in evidence the charter of the Erie Telegraph and Telephone Company, a corporation organized under the laws of the State of New York, for which the defendant was alleged to be trustee. On May 1, 1889, that company had an office and place of business in Lowell, and the defendant was one of its ten directors, seven of them, including the defendant, being residents of Lowell. The plaintiff offered evidence tending to show,

that, before proceeding to make the assessments for the year 1889, the assessors, in the latter part of April of that year, gave notice thereof to the inhabitants of the city of Lowell by posting in public places in the several wards of the city notifications that they were about to assess taxes, and requiring the inhabitants to bring in to the assessors, on or before June 15 of that year, true lists of all their polls and personal estates not exempt from taxation.

The record book of the board of assessors was introduced in evidence, showing that, on March 29, 1889, "George S. Cheney and Abel Wheeler of the board were appointed a committee to inquire into telephone matters for taxation. H. C. Dexter and J. E. Maguire, F. N. Edgell, appointed a committee to visit manufacturing cities and make inquiries as to the manner of corporation taxes in such cities."

A further record showed that on April 11, 1889, "The committee appointed to look after telephone matters advised that a suitable person be sent to Albany to look up matters in that direction, and said committee was authorized to use their discretion in the matter." A further record showed, that on July 25, 1889, it was "Voted to tax the directors of the Erie Telephone Company, as trustees, \$160,000 each." It appeared, that this was the entire contents of the record relating to the levy of the tax in this case, and that the records of the assessors failed to show any report of the committee to inquire into telephone stocks.

It was agreed that the defendant did not bring in any list of property as trustee until February 24, 1890, when he signed, swore to and delivered to the assessors the following list, filing with the assessors at the same time a petition for abatement of the tax assessed to him as trustee: "Upon the first day of May, A. D. 1889, there stood, as he is informed, in the name of the undersigned, Charles J. Glidden, a resident of said city, on Middlesex Street, Precinct 3, Ward 4 thereof, as trustee for the Erie Telegraph and Telephone Company, a corporation under the laws of the State of New York, two thousand (2000) shares of the capital stock of the Southwestern Telegraph and Telephone Company, a corporation under the laws of the State of New York, and doing business in the States of Arkansas

and Texas; also one hundred and forty-nine (149) shares of the capital stock of the Cleveland Telephone Company, a corporation under the laws of the State of Ohio, and doing business in the said State of Ohio; and also, thirteen hundred (1300) shares of the capital stock of the Northwestern Telephone Exchange Company, a corporation under the laws of the State of Minnesota and doing business in the said State of Minnesota; but the undersigned, as said trustee, never had in his possession, control or management a certificate of stock or any of them in any of said corporations, nor has he ever had any of the income, profits, or proceeds arising from the same, either upon the first day of May or subsequent thereto, and neither upon the first day of May nor at any time previous or subsequent thereto, could have delivered to any person any of said stock, nor could have transferred or conveyed the same, or any of the income or profits arising therefrom. The above is all the personal property in the name of the undersigned as trustee on the said first day of May, and of this he is not legally the owner and is not liable to be taxed therefor."

On the petition for abatement above mentioned there were a number of hearings before the assessors. There was no evidence that the defendant brought in to the assessors any list of his individual property liable to taxation in the year 1889. The personal property taxed to the defendant as trustee and valued at \$160,000 was described in the valuation list of the assessors, as follows: "Money, Income, Stocks, Bonds, and all other taxable securities taxable under the laws of this Commonwealth."

There were many exceptions to the exclusion of evidence offered by the defendant, to show, among other things, that the shares held by the defendant as trustee were of no value at the time of assessment. At the close of the evidence, the defendant asked for rulings that the action could not be maintained, and that it was barred by the statute of limitations and for many other rulings, thirty-eight in all, which were refused by the judge, the defendant excepting. The judge also refused to put certain questions to the jury, and the defendant excepted. The ground of the decision of the court has rendered most of the exceptions immaterial, and those that are material appear in the opinion.

The judge ruled: First. That the way and manner in which the description of the property had been set forth in the valuation list was a proper form in which it should be set forth. Second. That the statute of limitations had not run in favor of the defendant in this cause; and Third. That the only questions to be determined by the jury were, (a) whether the assessors ascertained as nearly as possible the particulars of the personal estate held by the defendant as trustee for the purposes of making this assessment, and (b) whether having obtained those particulars they estimated such property at its just value according to their best information and belief.

The jury found for the plaintiff in the sum of \$4,229.92; and the defendant alleged exceptions.

H. N. Shepard, (J. C. Burke with him,) for the defendant.

G. F. Richardson & F. W. Qua, for the plaintiff.

HAMMOND, J. In this action the plaintiff as collector seeks to recover a tax assessed upon the defendant as trustee. It is contended by the defendant that, even if he was a trustee, such was the nature and location of the property and his relation to it that he was not taxable as such. The first question is whether this ground of the defence is open to the defendant in this action. The assessment and collection of taxes is regulated by statute. The assessors are public officers, and, while their duties are of a quasi judicial nature, their jurisdiction is limited, based sometimes upon the residence of the person assessed, or of some other person interested in the property, and sometimes upon the situation of the property. Without reciting in detail the statutes, it is sufficient to say that they provide that each person may bring in a sworn list of the personal property for which he in any capacity should be taxed, and this list is to be received by the assessors as true (except as to valuation) unless he, being required thereto by the assessors, refuses to answer on oath all necessary inquiries as to the nature and amount of his property. In case a person does not bring in a list the assessors shall ascertain as nearly as possible his taxable property, and "make an estimate thereof at its just value, according to their best information and belief," and "such estimate . . . shall be conclusive" except in certain cases not here material. Pub. Sts. c. 11, §§ 38-42. Any person aggrieved by an assessment may apply for an

abatement to the assessors, and, by appeal from their decision, to the county commissioners, or Superior Court, and on questions of law may reach this court, but no person shall have an abatement unless he files a list as above provided. Pub. Sta. c. 11, §§ 69-72. St. 1890, c. 127.

This plain, adequate and complete remedy for the correction of errors, whether of law or fact, is the only one provided by our statutes; and when the assessors are acting within their jurisdiction it must be regarded as exclusive in accordance with the well known rule that, "when a new right is created by statute, which at the same time provides a remedy for any infringement of it, that remedy must be pursued." *Osborn v. Danvers*, 6 Pick. 98, 100.

But, when the assessors are acting outside their jurisdiction, their acts are absolutely void. Where, for instance, the tax ordered is illegal because for a purpose not authorized by law, the assessment is void. The assessors have no jurisdiction. *Bangs v. Snow*, 1 Mass. 181. *Stetson v. Kempton*, 13 Mass. 272.

So where the assessment is upon a non-resident for personal property claimed by reason of its location in the town where the assessment is made to be taxable there, if it appears that the non-resident had no personal property assessable there the tax is wholly void, even if he had taxable real estate there. The reason is that, the person assessed not being resident in the town where the assessment is made and so not within the jurisdiction of the assessors, their right to assess him, so far as respects personal property, depends upon whether he has assessable personal property in the town. Unless he has such property there their acts are void for want of jurisdiction.

Preston v. Boston, 12 Pick. 7, a leading case, affords a good illustration of the application of this principle. The plaintiff being domiciled in Medford and having taxable personal estate, but having in Boston only real estate, was taxed in the latter place for both real and personal estate. He paid the taxes, and in an action to recover back the money it was held that while the real estate tax was valid the personal estate tax was invalid, and he recovered that back. The ground of the decision as to the personal property was that the plaintiff was not an inhabitant

of Boston, and so not liable to be taxed there at all on his personal property. As to that the assessors had no jurisdiction. In giving the opinion, Shaw, C. J., said: "One not liable, not domiciled, is not within the jurisdiction of the assessors, any more than a stranger from another State, who should happen to be lodging at a hotel, when the tax was assessed. The whole proceeding therefore, in regard to him, is without authority *ab initio*." See also *Sumner v. Dorchester Parish*, 4 Pick. 361; *Inglee v. Bosworth*, 5 Pick. 498. Where, however, there is personal property of a non-resident which is taxable in the town where it is situated, the assessors of that town have jurisdiction, and consequently the only remedy of the person aggrieved is by abatement. *Little v. Greenleaf*, 7 Mass. 236. *Gray v. Kettell*, 12 Mass. 161.

Again, where a corporation owns real and personal estate and is taxable for the real and not for the personal estate, a tax upon the personal estate is absolutely void, *Amesbury Woollen & Cotton Manuf. Co. v. Amesbury*, 17 Mass. 461, *Boston Water Power Co. v. Boston*, 9 Met. 199, *Salem Iron Factory Co. v. Danvers*, 10 Mass. 514, the ground of the decision in these cases being that the corporation is not an inhabitant of the town for purposes of taxation. And the same principle is applied where the assessors undertake to assess a tax in excess of what is called for, or is allowed by law. *Joyner v. Egremont School District*, 3 Cush. 567. *Cone v. Forest*, 126 Mass. 97.

These and similar cases all proceed upon the principle that an assessment made by assessors who have no jurisdiction is not the assessment authorized by statute. It is no assessment at all and is absolutely void. As it is not the statutory proceeding the statutory remedy is not exclusive.

Such an assessment therefore can be attacked collaterally in an action of tort against the assessors where such an action will lie, or in an action against the town to recover back the money paid, or in defence to an action by the collector. These general remedies are not for those who are aggrieved by assessors acting within their jurisdiction, but are allowable to redress wrongs inflicted by persons who pretend to be assessors but who are not such because acting without jurisdiction.

Where, however, the tax is for a legal purpose and the assess-

ors have jurisdiction, whether it is based upon the fact that the person assessed be an inhabitant of the town where the assessment is made or upon the situation of the property or any other jurisdictional fact shown to exist, and they proceed essentially in accordance with the statutes, their decision as to the nature and amount of the taxable property of a person who has not brought in a list is valid. It cannot be attacked in any collateral proceeding, but must stand until changed in a proceeding under the statute for abatement. There are sound and obvious reasons for this rule, which are set forth at some length in *Lincoln v. Worcester*, 8 Cush. 55, 65, 66.

Among the numerous cases where the doctrines above stated have been applied by this court, see in addition to those already cited, *Bates v. Boston*, 5 Cush. 93; *Howe v. Boston*, 7 Cush. 273; *Bourne v. Boston*, 2 Gray, 494; *Ingram v. Cowles*, 150 Mass. 155; *Carleton v. Ashburnham*, 102 Mass. 348.

The defendant in the case at bar was an inhabitant of Lowell, and he had taxable personal property there. The only list he brought to the assessors was that of February 24, 1890, several months after the warrant had been committed to the collector, and even that purported to relate only to the property held by him as trustee. Being an inhabitant of the city and having taxable personal property there, he was within the jurisdiction of the assessors. While the tax was in part against him as an individual and in part as trustee, still it was all a personal tax. If valid, the collector could sue, distrain or arrest as well for the one part as for the other. The assessors called for a sworn list of taxable personal property. Such a list should contain all such property held by a person either as an individual or in a representative capacity. In the absence of such a list from the defendant the assessors proceeded to consider his case. They had before them not only the question whether he was taxable for any personal property held by him as an individual but also whether he was taxable for any such property held by him in a representative capacity. The whole case was before them and it was their duty to investigate and decide it. That duty they performed, and they decided that he had taxable personal property not only as an individual but as a trustee, and they made an estimate thereof. The jury have found that in performing this work they "ascertained as nearly

as possible the particulars of the personal estate held by the defendant as trustee, for the purposes of making this assessment," and that "having obtained those particulars they estimated such property at its just value according to their best information and belief." We are of opinion that the evidence fully justifies the finding. Indeed, the assessors seem to have been impressed with the importance and magnitude of the question, and to have made unusual efforts to get at the facts both as to the nature and value of the property. It is true that a tax upon real estate is separate and distinct from that on personal estate, *Preston v. Boston*, *ubi supra*, but we do not think the statutes intended that there should be a division of the tax on personal estate, so far as concerns the remedy for a person aggrieved.

We are not unmindful of the case of *Dorr v. Boston*, 6 Gray, 131. In that case it appeared that the plaintiff was a woman and had no taxable property in this State. As to whether the case of *Preston v. Boston*, *ubi supra*, was rightly interpreted in that case, see *Lincoln v. Worcester*, 8 Cush. 55, 62, and *Bates v. Boston*, 5 Cush. 93, 97.

So far therefore as respects the nature and value of the property and his relation to it, the grievance of the defendant, if any, is one of over valuation, and his only remedy is by the statutory proceeding for abatement. He cannot avail himself of this portion of his defence in this action. *Pierce v. Eddy*, 152 Mass. 594, 596.

The objection that the description of the property is not sufficient is not tenable. *Noyes v. Hale*, 137 Mass. 266, 270, 271.

Nor is the action barred by the statute of limitations. In the early history of the Commonwealth the collector of taxes, so far as respected a tax on personal property, could collect only by demand, distress or arrest; St. 1785, c. 50, § 6; but soon after the adoption of the Constitution he was authorized in certain cases of the removal, death or marriage of a delinquent taxpayer, to bring an action at law; St. 1788, c. 4; and this remedy has been extended from time to time to other cases until finally it is applicable generally to all taxes upon real or personal property. St. 1842, c. 34; 1848, c. 235; 1859, c. 171. Gen. Sts. c. 12, §§ 18, 19, 20. St. 1878, c. 189, § 4. Pub. Sts. c. 12, §§ 21, 22, 23. St. 1889, c. 334, § 7. At the date of the writ in this case

the statute last cited provided that the action could be brought by the collector in his own name if the tax remained unpaid for three months after it was committed to him. He has no right of action except that given by the statute. *Crapo v. Stetson*, 8 Met. 393. *Ricker v. Brooks*, 155 Mass. 400. The tax in question was assessed as of May 1, 1889, and the warrant for its collection was committed to the collector September 10, 1889. The statute took effect May 14, 1889. The cause of action therefore did not arise until three months after September 10, 1889, or until December 10, 1889. The action was brought July 6, 1895, a time well within the six years from the time the cause of action accrued.

The defendant's brief contains an elaborate argument in support of the proposition that our statutes relating to the assessment of taxes are unconstitutional because they do not give the party assessed an opportunity to be heard. But he does have full opportunity to be heard before the assessing board, if he desires it, before the demand becomes conclusively established against him, and that is enough. *Cooley, Taxation*, 361, 363, 364, and cases cited.

There was ample evidence of a demand upon which to base interest, and in the absence of anything to the contrary in the brief of the defendant we consider the exception on that point waived.

Without going over the exceptions further in detail, it is sufficient to say that we see no error of law made by the presiding judge at the trial.

Exceptions overruled.

CHARLES R. GODDARD & others vs. CITY OF LOWELL
& others.

Middlesex. May 23, 1901. — September 5, 1901.

Present: HOLMES, C. J., KNOWLTON, LATHROP, HAMMOND, & LORING, JJ.

*Municipal Corporations, Prohibitions upon city council in amended charter of Lowell.
Contract, Validity.*

In the amended charter of the city of Lowell, St. 1896, c. 415, § 3, creates a department of supplies, and § 7 prohibits the city council from taking part in the purchase of material or in the making of contracts for the city. In the year 1900 the city council of Lowell passed an ordinance approved by the mayor, providing, "That all printed matter for the city of Lowell shall hereafter bear the imprint of the Union Label of the Allied Printing Trades Council of Lowell, Mass." and "That in calling for bids for city printing hereafter, the chief of the department of supplies shall make stipulation in accordance with" the foregoing requirement. The board of health of Lowell advertised for bids for printing certain blanks and letter heads, and accepted a bid of \$24.50 from a bidder who had a right to use the union label, declaring by vote that they did so for that reason, and rejecting a bid of \$16.55 from a bidder who had not the right to use the label. On a petition of more than ten taxable inhabitants under St. 1898, c. 490, to enjoin the payment of money by the city under the contract, it was held, that the ordinance was invalid, as an attempt to interfere in the making of contracts for printing, by directing with whom the contracts should be made, and was in direct conflict with the provisions of the amended charter; that, whether the ordinance applied to the board of health or not or whether or not they called for bids in accordance with it, the fair inference was that in awarding the contract that board did not exercise their untrammelled judgment but were controlled by the illegal behest of the ordinance which they supposed to be binding upon them; so that the contract was void and the money of the city was about to be illegally expended, which brought the case within St. 1898, c. 490.

PETITION under St. 1898, c. 490, by more than ten taxable inhabitants of the city of Lowell, the first named being the lowest bidder hereafter mentioned, against that city, its treasurer, its board of health and the Courier-Citizen Company, to enjoin the payment of money by the city to the company named under a contract made with that company by the board of health and alleged to be illegal, filed February 21, 1901.

In the Superior Court, the case was heard by *Sheldon, J.*, who, at the request of the parties, reported it for the determi-

nation of this court, such decree to be entered as justice and equity might require.

It appeared by the report, that, a demurrer to the petition having been overruled, the respondents by their answer and by subsequent agreement admitted the truth of the following allegations of fact contained in the petition :

That the City Council of Lowell passed an ordinance approved by the mayor on December 15, 1900, entitled "An Ordinance providing for the printing of the Union Label on all printing for the City of Lowell," which ordinance was as follows :

"Section 1. That all printed matter for the City of Lowell shall hereafter bear the imprint of the Union Label of the Allied Printing Trades Council of Lowell, Mass.

"Section 2. That in calling for bids for city printing hereafter, the Chief of the Department of Supplies shall make stipulation in accordance with Section 1 of this ordinance.

"Section 3. This ordinance shall take effect upon its passage."

That the "Union Label" referred to in the foregoing ordinance was a device the use of which in Lowell was controlled or assumed to be controlled, by a voluntary association called the "Allied Printing Trades Council, Lowell, Mass.," which permits the use of the label only by printers and printing houses who employ exclusively as compositors and pressmen members of "The Typographical Union," so called, and the "Printing Pressmen's Union," so called, and that, if the terms of the ordinance are observed and enforced, the effect of the ordinance is that no printing for the city of Lowell can be done except by printers who employ exclusively as compositors and pressmen members of the two last named voluntary associations; that on or about February 7, 1901, the board of health of Lowell, by one Horace H. Knapp, their agent, solicited certain printers in Lowell, including the defendant Courier-Citizen Company and the plaintiff Charles R. Goddard, doing business under the name of The Butterfield Printing Company, to submit bids for the printing of sundry blanks, letter-heads and note-heads, and the Courier-Citizen Company, in response to this solicitation offered to do the printing for the sum of \$24.50, and the Butterfield Printing Company, in response to the solicitation

tation offered to do the same printing for the sum of \$16.55, which last named offer was the lowest bid received for the printing by the board of health; that the Courier-Citizen Company employs exclusively as compositors and pressmen members of the two unions last named and has the right to use the label above mentioned, while the Butterfield Printing Company does not employ exclusively members of those unions and does not have the right to use the label; and that on February 19, 1901, the board of health awarded the contract to the Courier-Citizen Company.

In addition to the allegations of fact admitted as above, the judge reported the following evidence: The petitioners introduced in evidence the record of a meeting of the board of health of the city of Lowell, held February 19, 1901. This record was as follows:

"Lowell, Mass., February 19, 1901, 4.30 P. M. Regular meeting of board, all members present. Records of last meeting read and approved. The following bids for printing the following articles were read: 500 Blanks, sample No. 1; 500 Blanks, sample No. 2; 500 Blanks, sample No. 3; 2 Reams Letter Heads, No. 4; 1 Ream $\frac{1}{2}$ Letter Heads, No. 4; 2 Reams Letter Heads, No. 5; 1 Ream Letter Heads, No. 6; 1 Ream Letter Heads, N. 6; 1,000 Plumbing Applications, No. 7.

"The Union Printing Company, \$33.80; The Lawler Printing Company, \$30.65; O. A. Libby, \$29.35; Lowell Sun, \$24.50; Courier-Citizen Company, \$24.50; Butterfield Printing Company, \$16.55.

"On motion it was voted to award the printing to the Courier-Citizen Company, as they use the Union Label, prescribed and voted by the Lowell City Council, Dec. 15, 1900. Approved, John H. McGuinness, Secretary."

It was agreed that the Lawler Printing Company and the Courier-Citizen Company above named were authorized by the "Allied Printing Trades Council of Lowell, Mass.," to use the "Union Label," so called, and that the other printers and printing companies above named were not so authorized.

The respondents introduced evidence tending to show, that the actual cost of doing the work under the contract in question would have exceeded the sum of \$16.55; but the judge found that not to have been the fact.

It was agreed by counsel, that in calling for bids there was no discrimination by the board of health against the non-union printing offices.

St. 1896, c. 415, is an act to amend the charter of the city of Lowell.

Section 3 creates a department of supplies and provides for the election of the chief of this department by the voters of the city at the annual municipal election.

Section 6 begins as follows: "The heads of the several departments and offices shall have the general charge and management of all matters pertaining to their respective departments, and shall make and execute all contracts necessary therefor, except for the purchase of material and supplies; but every contract made as aforesaid in which the amount involved exceeds three hundred dollars shall be approved by the mayor before going into effect."

Section 7 is as follows: "Neither the city council nor either branch thereof, nor any committee or member thereof, shall directly or indirectly take part in the employment of labor, the purchase of material, the construction, alteration or repair of any public works or other property, or in the care, custody or management of the same, or in general in the expenditure of public money or in the conduct of the executive or administrative business of the city, except as may be necessary for defraying the contingent and incidental expenses of the city council or of either branch thereof; nor shall they or either of them take part in the making of contracts."

H. A. Brown, for the petitioners.

F. W. Qua, for the respondents.

HAMMOND, J. St. 1896, c. 415, provides that in the city of Lowell there shall be a "department of supplies," that the chief of such department shall be elected by the people at the annual municipal election, and shall hold office for the next municipal year thereafter subject to removal by the mayor, "for such cause as he shall deem sufficient," and that all material and supplies for the city shall be purchased by him subject to the approval of the mayor. §§ 2, 3. It further provides that "neither the city council nor either branch thereof, nor any committee or member thereof, shall directly or indirectly take

part in the . . . purchase of material," with certain exceptions not here pertinent, "nor shall they or either of them take part in the making of contracts." § 7. This statute works a great change as to the powers of the city council in the matter of making contracts. See *Muldoon v. Lowell*, 178 Mass. 134, 138. The ordinance of December 15, 1900, is plainly an attempt to interfere in the making of contracts for printing, by directing with whom the contract shall be made. It is in direct conflict with the statute, and is invalid for that reason alone. It therefore becomes unnecessary to consider the other and broader grounds upon which the petitioners attack it.

It is argued by the respondents that the ordinance does not apply to the board of health, and that the fact that the board invited bids from union and non-union men alike shows that they did not consider themselves bound by it. The board of health had before it bids from five different parties. The lowest bidder could not use the label prescribed by the ordinance. The two next lowest bids were equal in amount, and of these bidders one could use the label and one could not. In this state of things the board passed over the lowest bidder, and of the next two lowest bidders awarded the contract to that one, a company, who could use the label, and the record shows that it was voted to award the contract to that company "as they use the Union Label, prescribed and voted" by the ordinance. They give no other reason for their action, nor does it appear that there was any other reason. The only fair and natural inference is that in thus awarding the contract they felt bound by the ordinance and did not feel at liberty to exercise their own judgment as against it, and that they desired to make this appear on their records; and this is so whether or not the ordinance was applicable to them or whether or not they called for bids in accordance with it. It thus appearing that in awarding this contract they did not exercise their untrammelled judgment but were controlled by an illegal behest which they supposed to be binding upon them, it is clear that the contract ought not to stand. It is not legal because not made as the law requires, and no city official may properly expend money to carry it out. The respondents are about to expend money under it. In the language of St. 1898, c. 490, they are about to expend money in

a manner other than that in which such city has the legal right to expend money. The case is within the statute.

Decree for the petitioners.

MARY A. TOLAND vs. PAINE FURNITURE COMPANY.

JOHN TOLAND vs. SAME.

Suffolk. March 13, 14, 1901. — September 6, 1901.

Present: HOLMES, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Negligence, In a building. Evidence, Remoteness, Experts. Interrogatories.

In an action for personal injuries, there was evidence, that the plaintiff had come to the defendant's shop to purchase furniture and had followed a salesman and a friend through a doorway hung with portières into a room where the light was dim and less than in the room she had left, when her foot caught and she fell down a flight of stairs leading to the basement and was injured, that a rubber mat over which she passed was curled up at the edge, was of cheap material and much worn and had been in the same condition for two or three months previously, also that at the time of the accident the head of the staircase was unguarded although a desk was usually kept there. The plaintiff contended that her fall was due to the bad condition of the mat and the unguarded condition of the staircase. *Held*, that there was evidence for the jury of the defendant's negligence.

In an action to recover for injuries caused by the plaintiff, who had gone into the defendant's shop to purchase furniture, catching her foot in the curled up edge of a worn rubber mat of poor quality, evidence of the condition of the mat four hours after the accident, there being no evidence of any change in the meantime, is admissible to show its condition at the time of the accident.

In an action to recover for injuries occasioned by the plaintiff, who had gone into the defendant's shop to purchase furniture, catching her foot in the curled up edge of a worn rubber mat of poor quality, a salesman for fifteen years of the rubber company which supplied the matting in question, who had seen rubber mattings in various stages of wear and part of whose work had been to replace rubber matting that was worn out and who to a certain extent was familiar with the effect of various degrees of wear on rubber mattings, was allowed against objection to testify as to the effect of wear upon such rubber matting as that in which the plaintiff caught her foot under the conditions assumed to exist in the case. *Held*, that whether a witness called as an expert has the requisite qualifications and knowledge is largely a matter for the trial judge and his finding thereon will not be interfered with unless it clearly appears to be erroneous, and that under this rule the court could not say that allowing the witness to testify as an expert was erroneous, or that what he testified to was matter of common knowledge.

Under Pub. Sts. c. 167, § 53, providing that by interrogatories, if the party to the suit is a corporation, the opposite party may examine the president, treasurer,

clerk, or any director or other officer thereof, in the same manner as if he were a party to the suit, a president so interrogated may be compelled not only to answer as to matters within his personal knowledge but also to inquire of his officers, servants and agents, and to state the information received from them.

TWO ACTIONS OF TORT, one by a wife for injuries and the other by her husband for loss of her companionship and services, by reason of the plaintiff in the first case catching her foot in a rubber mat curled up in the middle by wear and fastened down at both ends, as she turned after passing through a door with portières, and falling down a flight of stairs. Writs dated respectively September 22, 1897, and March 24, 1899.

The first case was before the court on exceptions taken at a former trial, which were sustained by this court in a decision reported in 175 Mass. 476. Later the two cases were tried before *Aiken, J.*, who refused to order verdicts for the defendant, and the jury returned verdicts for the plaintiff in the first case for \$5,500 and in the second case for \$750.

The judge reported the cases for the determination of the questions of law by this court. If verdicts for the defendant should have been ordered on the evidence as it stood, or if verdicts for the defendant should have been ordered on the evidence after striking out what should have been excluded, judgments were to be entered for the defendant. If there was error in any other rulings of the judge, new trials were to be ordered. If there was no error in the rulings then judgments were to be entered on the verdicts.

There was also a bill of exceptions allowed by *Fessenden, J.*, to an order of the Superior Court to the president of the defendant to answer certain interrogatories. The questions raised by the report and that raised by the bill of exceptions are stated in the opinion of the court.

J. Lowell & S. H. Smith, for the defendant.

C. F. Choate, Jr., for the plaintiffs.

LATHROP, J. These are two actions of tort brought against a corporation dealing in furniture, in whose shop the plaintiff in the first case, while there on business, fell down a flight of stairs, and was injured through the alleged negligence of the defendant. The second action is brought by the husband of the plaintiff in the first case, to recover for expenses incurred by him for

medical attendance, etc., and for loss of the comfort, services, society and companionship of his wife. After verdicts for the plaintiffs, the cases were reported for our determination, by the judge who tried them in the Superior Court, and upon a bill of exceptions to the order of the judge ordering the president of the defendant company to answer certain interrogatories.

When the first case was last before us, 175 Mass. 476, the defendant's exceptions were sustained on the ground that, if there was a defect, the evidence did not show that it had been there so long that the defendant knew or ought to have known of it. It was also remarked in the opinion: "It is not contended, and it could not be, that the maintenance of the stairway close by the door through which the plaintiff passed, and the neglect of the defendant to warn the plaintiff of it constituted negligence on its part. *Hunnewell v. Haskell*, 174 Mass. 557." In reference to the last remark, it may be stated that an examination of the bill of exceptions, when the case was formerly before the court, shows that it contained this sentence: "It was understood at the trial that the plaintiff made no contention as to there being any lack of light." In the present case there is such a contention. So, too, the evidence now before us differs essentially from that at the former trial, and the opinion already given affords us no assistance.

The first question in this case is whether the judge at the close of the evidence should have instructed the jury to return verdicts for the defendant. Of course the second case depends upon the first, and the questions are whether there was sufficient evidence that the plaintiff in the first case was in the exercise of due care, and whether the defendant was guilty of negligence. The evidence for the plaintiff tended to show the following facts.

The accident happened about noon on Saturday, April 3, 1897, a bright, clear day. The plaintiff went into the shop to purchase furniture. On entering, a salesman was assigned to her, and he conducted her, and a friend who was with her, across the shop and through a doorway where portières were hanging. The salesman and the plaintiff's friend passed through first. The portières swung back, and were pushed aside by the plaintiff. She passed through, took a few steps, her foot caught, and she

fell down a narrow flight of steps leading into the basement. The light in the room where the plaintiff fell was dim, not so light as the room from which she had come. There was a long rubber mat extending across the room, and between that and the head of the stairs was a small rubber mat, with a space of an inch and a half between them, caused by the edge of the smaller mat curling up. This mat was originally tacked down, but some of the tacks had come out of their holes in the floor and were curled under the mat, flattened over one side, and rusty, and the holes in the floor were filled with dust.

There was evidence to show that the mats were made of cheap material, and were found to be much worn soon after the time of the accident. The contention of the plaintiff was that the plaintiff's fall was due to the bad condition of the mats, and the unguarded condition of the staircase, and there was evidence on both of these points. There was also evidence that the mats had been in the same condition in which they were at the time of the accident for two or three months prior thereto, although there was contradictory evidence as to what this condition was. As to the unguarded stairs, there was evidence that a desk was usually kept at the head of the stairs, so that a person could not fall down there, though there was evidence that it was put there to hide an ugly post. Whether it was there on the day of the accident was in dispute.

It was not contended that the plaintiff was not in the exercise of due care, and the whole of the defendant's case rests on the assumption that leaving out the testimony of some of the witnesses on behalf of the plaintiff, whose evidence was objected to, it did not appear that the defendant was guilty of negligence. This may be granted, and we have hitherto treated the case as if the evidence was admissible. So treated there was enough evidence for the jury of the defendant's negligence.

We proceed to consider the evidence objected to.

One McKenzie testified as to the condition of the stairs, and the mats, on Saturday the day of the accident at four o'clock and on the Monday morning following. He testified that the condition was the same on Monday as on Saturday. The question then is whether a defective condition of things found four hours after an accident, there being no evidence of any change in the

meantime, is admissible to show the condition at the time of the accident. We have no doubt that the evidence was admissible. *Daniels v. Lowell*, 139 Mass. 56. *Cutter v. Hamlen*, 147 Mass. 471, 476. *Neal v. Boston*, 160 Mass. 518. *Shepard v. Creamer*, 160 Mass. 496. This disposes also of the exception to the admission of the testimony of one McClellan, who visited the shop with McKenzie on Monday morning.

One Muldoon, a salesman for fifteen years of the Boston Belting Company, which manufactured rubber goods, testified that his company supplied the rubber matting in question, and that he supplied matting for railroads, and had seen rubber mattings in various stages of wear; that at times, with customers of his who had dealt with him before, it had been part of his work to attend to replacing rubber matting which was worn out; and that to a certain extent he was familiar with the effect of various degrees of wear upon rubber matting. He was then allowed to testify, subject to the exception of the defendant, as to the effect of wear upon such rubber matting, under the conditions assumed to exist in the case. The only objections urged are that he was not qualified as an expert, and that what he testified to was a matter of common knowledge. Whether a witness who is called as an expert has the requisite qualifications and knowledge to enable him to testify is largely a matter for the trial court; and the finding of the presiding judge upon this point will not be interfered with unless it clearly appears to be erroneous. *Perkins v. Stickney*, 132 Mass. 217. *Hardiman v. Brown*, 162 Mass. 585. We cannot say in this case that the allowing of Muldoon to testify as an expert was erroneous. Nor can we say that what he testified to was a matter of common knowledge.

The remaining question relates to the order of the court that the president of the defendant company answer certain interrogatories filed under the Pub. Sts. c. 167, §§ 49 *et seq.* At the argument it was contended that there was error only in requiring the president to answer interrogatories 7, 10 and 11. These required the president, if he did not know certain facts inquired about of his own knowledge, to inquire of his officers, servants and agents, and to state the information received from them.

The question sought to be raised was so recently before the court in *Gunn v. New York, New Haven, & Hartford Railroad*,

171 Mass. 417, that no discussion of it is necessary. The case at bar is clearly within the rule there laid down.

The result is that the order must be

Exceptions overruled; judgment for the plaintiffs on the verdicts.

MAUDE E. JEFFREY & others vs. DAVID ROSENFELD.

Middlesex. January 22, 1901. — September 7, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, BARKER,
HAMMOND, & LORING, JJ.

Alteration of Instruments. Negotiable Instruments Act. Equity Jurisdiction.

Semle, that a bill in equity seeking relief on the ground that an alteration was made in a certain negotiable instrument should describe the alteration, in order that the court may see whether as matter of law it was a material alteration under St. 1898, c. 533, § 125. *Whether*, such defect could be taken advantage of on a general demurrer for want of equity, *quære*.

Whether § 124 of the negotiable instruments act, St. 1898, c. 533, which is copied from § 64 of the English bills of exchange act, should be construed as the original section probably would be in England, that the effect of a material alteration by whomsoever made would be to avoid the note as to all parties except those consenting to it and subsequent indorsers, or whether the rule in this Commonwealth as laid down in *Drum v. Drum*, 133 Mass. 566, would be applied, that a material alteration of a note by a stranger will not avoid it, *quære*.

Semle, that under St. 1898, c. 533, § 124, where a loan of money is secured by a note and mortgage, a material alteration of the note without fraud may not cancel the debt or avoid the mortgage.

A bill in equity, to restrain the foreclosure of a mortgage on the ground that after the delivery of the mortgage and note there was a material alteration of the note without the plaintiff's assent, contained no allegation of fraud or of fault on the part of the mortgagee, and no allegation that the note or the debt which the mortgage was given to secure had been paid or that there was any tender or offer of payment. *Held*, that the bill did not state a case which entitled the plaintiff to relief in equity.

MORTON, J. This is a bill in equity to restrain the foreclosure of a mortgage on the ground that, after the delivery of the mortgage and note, there was a material alteration of the note without the plaintiffs' assent. The nature of the alteration or by whom it was made is not set out, nor is it alleged that

the alteration was fraudulent. There was a demurrer for want of equity, and on the grounds that the bill did not state a case that entitled the plaintiffs to relief, and that they had an adequate remedy at law. The demurrer was sustained, and the bill dismissed and the plaintiffs appealed.

The defendant contends that the nature of the alleged alteration should have been specifically set forth. St. 1898, c. 533, § 125, the negotiable instruments act, provides what alterations shall be deemed material, and it would seem for that and other reasons, that as matter of correct pleading the bill should have described the alteration relied on, in order that the court might see whether as matter of law the alteration was a material alteration. But for the purposes of this case we assume in favor of the plaintiffs, without deciding, that this defect if relied on as a ground of demurrer should have been particularly pointed out, and that it is not open to the defendant when the cause of demurrer assigned is the general one of a want of equity or that the bill does not state a case which entitles the plaintiffs to relief.

The question which has been chiefly argued relates to the effect of the alteration of the note upon the mortgage. The bill alleges that the mortgage was given to secure the payment of the note, but for aught that appears the transaction was the ordinary one of a loan of money secured by a note and mortgage. At any rate there is nothing to show that the note and mortgage were not both given upon the same consideration, and to secure the same debt, and there is no allegation that the debt has been paid or satisfied in any way. If the mortgage was given to secure the personal obligation created by the note and nothing more, the allegations of the bill should have been more specific.

There is no doubt that the effect of a material alteration of a note has been held to be different in some respects in England from what it has been held to be in this country. Thus it has been held there that a material alteration even by a stranger without the knowledge or assent of any of the parties to the note will avoid it. *Davidson v. Cooper*, 11 M. & W. 778; 13 M. & W. 343.

And very likely it would be held under the bills of exchange

act that the effect of such an alteration by whomsoever made would be to avoid the note as to all parties except those consenting to it and subsequent indorsers. Chalmers' Bills of Exchange, (5th ed.) 213, 214.

But the law has been laid down differently in this Commonwealth (*Drum v. Drum*, 133 Mass. 566); and, according to the weight of authority in this country, a material alteration of a note by a stranger, or a spoliation of it, as it is termed, will not avoid the note. *Drum v. Drum*, *ubi supra*. Dan. Neg. Instr. (3d ed.) § 1373 *a*. 2 Pars. Notes & Bills, (1st ed.) 574. Norton, Bills & Notes, (2d ed.) 234, 235. 1 Ames Cases on Bills & Notes, 449.

Whether, therefore, § 124 of the negotiable instruments act (St. 1898, c. 533,) which is copied from § 64 of the bills of exchange act (St. 45 & 46 Vict. c. 61,) should receive the same construction which that has received or which it undoubtedly will receive, deserves serious consideration. The statute enacted in this State is the same in substance and effect as that adopted by the Conference of Commissioners on Uniformity of Laws, which met at Detroit in 1895, and has already been enacted in fifteen States (14 Harv. Law Rev. 241, December, 1900, by Professor Ames); and although it is largely copied from the English act and is in many of its provisions an almost if not quite verbatim copy of that act, it would seem not unreasonable to suppose that it was the intention of the framers of the American act that § 124 should be construed according to the law of this country rather than that of England. But it is not necessary to pass upon that question now. In England as in this country, except when an alteration is fraudulent, it does not cancel or extinguish the debt for which the note was given. *Sutton v. Toomer*, 7 B. & C. 416. *Atkinson v. Hawdon*, 2 A. & E. 628. Byles on Bills, (4th Am. ed.) 257. 2 Am. & Eng. Encyc. of Law, (2d ed.) 200, 202. Dan. Neg. Inst. (3d ed.) §§ 1410 *a*, 1411. 2 Pars. Notes & Bills, (1st ed.) 571, 572.

And the cases are numerous in which it has been held that a party could recover upon the original consideration, notwithstanding there had been a material alteration of the written contract. *Lee v. Butler*, 167 Mass. 426. *Nickerson v. Swett*, 135 Mass. 514. *Adams v. Frye*, 3 Met. 103. *Smith v. Dunham*, 8 Pick

246. *Milberg v. Storer*, 75 Maine, 69. *Croswell v. Labree*, 81 Maine, 44. *Keene v. Aldrich*, 19 R. I. 309.

Following out this principle, it has been held in many cases that the material alteration of a mortgage note if not fraudulent will not avoid the mortgage. *Elliott v. Blair*, 47 Ill. 342. *Vogle v. Ripper*, 84 Ill. 100. *Clough v. Seay*, 49 Iowa, 111. *Gillette v. Smith*, 18 Hun, 10. *Cheek v. Nall*, 112 N. C. 370. *Heath v. Blake*, 28 S. C. 406, 416. 2 Am. & Eng. Encyc. of Law, (2d ed.) 202. 2 Jones, Mortgages, (8d ed.) § 1215.

It is true that in this State it is held, contrary to what is the law in most of the States and in England, that a negotiable note is *prima facie* payment of the debt for which it is given. But the rule is not an unqualified one. *Curtis v. Hubbard*, 9 Met. 822. Thus where a note is avoided by the maker for illegality or fraud the promisor may recover the original consideration in an action for money lent or money had and received, (*National Granite Bank v. Tyndale*, ante, 390; *Walker v. Mayo*, 143 Mass. 42,) and the presumption of payment is rebutted when the effect will be to deprive a party of security which he has taken for the payment of the debt for which the note was given. *Curtis v. Hubbard*, *ubi supra*. *Davis v. Parsons*, 157 Mass. 584.

This being the state of the law at the time of the passage of the negotiable instruments act, we should hesitate to say that the effect of § 124 is not only to avoid the note in case of a material alteration, but to cancel the debt for which it was given, and to deprive a party of the benefit of any security that he may have taken.

But it is not necessary to go so far. This is a suit on the equity side of the court. As already observed, there is no allegation of fraud in the bill, or of fault on the part of the mortgagee. For aught that appears the alteration in the note may have been made by a stranger, or may have been innocently made by the holder for the purpose of rectifying what he supposed to be a mistake occurring under such circumstances that he would be entitled in equity to a reformation of the note and mortgage. There is no allegation that the note or the debt which the mortgage was given to secure has been paid and there is no tender of payment.

The mortgage is a separate instrument from the note. At

law and in equity the holder can enforce his remedy upon the mortgage independently of or concurrently with that on the note, and in some cases, at least, where he had lost his remedy upon the note. *Thayer v. Mann*, 19 Pick. 535. 2 Jones, Mortgages, (3d ed.) §§ 1215 *et seq.* Under the circumstances, there being no allegation of payment and no offer of payment in the bill, we think that the bill does not state a case which entitles the plaintiff to relief and that the demurrer was rightly sustained and the bill rightly dismissed.

Decree affirmed.

J. B. Dixon, for the plaintiffs.

J. F. Libby, (*L. L. G. de Rochemont* with him,) for the defendant.

JOHN J. HOGAN, executor, & another, *vs.* HEIRS OF
MARY ROCHE.

Middlesex. March 13, 1901. — September 14, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, BARKER,
HAMMOND, & LORING, JJ.

Evidence, Opinion, Cross-examination.

On the issue of the soundness of mind of a testatrix, each of four witnesses was asked whether he or she, during the time mentioned, observed in the testatrix "any peculiarity of manner, speech or conduct." The witnesses answered "No" or "Never." *Held*, that the question did not call for an opinion but for a fact, and was admissible.

On the issue of the soundness of mind of a testatrix, a witness for the contestants testified to peculiar actions of the testatrix. It had appeared in evidence that six years before the date of the will, the testatrix made a present of \$1,000 to a son of the witness. On cross-examination the witness was asked "Do you think that at that time — did you at that time think that the testatrix had sufficient mental capacity to give that money to your son?" He answered "I suppose she had." Another witness, who had testified to peculiar actions of the testatrix, was asked on cross-examination about a certain remark made to the witness by the testatrix, and was then asked "Do you think she knew what she was about when she said that?" and answered "I don't know," and then being asked "What is your opinion?" answered "I think she was all right at that time." To the further question "Did you think at that time she knew what she was talking about?" the witness answered "I think she did," and to the question "Do you think so now?" gave an affirmative answer. *Held*, that in spite

of the rule that a witness, who is not an expert or a subscribing witness to the will, is not allowed to give his opinion as to the soundness of mind of a testator, the questions put in this case afforded the contestants no ground for exception; that the whole object of the questions was to show how the testatrix appeared to the witnesses at the times in question and thus to show the improbability of the previous statements made by the witnesses, and that for this purpose the cross-examination was legitimate, although the result might have been reached in a less questionable manner.

When evidence admissible for one purpose is inadmissible for another, upon which it would have a bearing if not excluded by rules of law, it must be assumed that a justice passing upon the facts considers it only upon those issues which it legitimately affects. Thus expressions of opinion as to the sanity of a testator at the time he did certain acts, admitted on cross-examination for the purpose of showing the improbability of the statements made by the same witnesses on their direct examinations, will be assumed to have been taken into account, by the justice who allowed the will, only so far as they tended to contradict premises seeming to lead to a different conclusion, and not as evidence tending in itself to establish sanity.

On the issue of the soundness of mind of a testatrix who had been a domestic servant, a niece of the testatrix who was a servant in the same house testified as a witness for the contestants to many peculiar actions of the testatrix, and as to her using disrespectful language in the presence of her employer and disobeying his orders. She was asked on cross-examination "Did you ever hear Dr. G. find any fault with your aunt during all the time you were there, and if so, what did he say?" The question was admitted for the purpose of contradicting the story told by the witness on her direct examination. The witness in answer testified to a number of times when the employer had found fault with the testatrix. *Held*, that the question was admissible.

APPEAL from a decree made by *Lawton, J.*, in the Probate Court for the county of Middlesex, disallowing the will of Mary Roche, late of Lowell, on the ground that at the time of making it she was not of sound mind. Petition filed February 25, 1898.

The case was heard on appeal by *Loring, J.*, who reversed the decree of the Probate Court and admitted the will to probate. The contestants alleged exceptions to the admission of certain evidence which are stated in the opinion of the court.

The case was argued at the bar in March, 1901, and afterwards was submitted on briefs to all the justices.

W. H. Bent, for the contestants.

G. F. Richardson, (*J. J. Hogan* with him,) for the appellants.

LATHROP, J. The exceptions in this case relate entirely to the admission of evidence. The question before the justice was whether Mary Roche at the time she executed the instrument propounded as her will was of sound mind. As is usual in such cases evidence was put in, as bearing on this question, as to the

condition of the testatrix both before and after the making of the will.

The first four exceptions may be considered together, as they relate practically to the same question put to four witnesses who testified in support of the will. It was in substance whether he or she, during a time mentioned, observed in the testatrix "any peculiarity of manner, speech or conduct." The witnesses answered "No," or "Never." The question did not call for an opinion but for a fact, and was clearly admissible. See *Clark v. Clark*, 168 Mass. 523, 526, 527, and cases cited.

The remaining exceptions relate to questions allowed to be put on cross-examination to witnesses for the contestants.

Michael J. Welch, the husband of one of the contestants, testified in their behalf. It appeared that the will was executed on January 25, 1898, and that the testatrix died on the sixteenth of the following month. It also appeared that in 1892, the testatrix had made a present of \$1,000 to a minor son of Michael; that at this time Michael was absent, and did not know of the fact until some months later. It further appeared in evidence that a few months after the gift the son gave to the testatrix a certain paper writing, wherein it was stated that the testatrix gave the said sum of \$1,000 and all her furniture in consideration that he should board and "room" her during the term of her natural life. This instrument was not signed or executed.

Michael testified at the trial in behalf of the contestants, among other things, as to the peculiar actions of the testatrix, and was asked, on cross-examination, "Do you think that at that time—did you at that time think that Mary Roche had sufficient mental capacity to give that money to your son?" He answered, "I suppose she had."

Bridget Welch, a sister of the testatrix and one of the contestants, on direct examination testified to various peculiar actions of the testatrix. She was asked, on cross-examination, the following question: "She said something at some time about your—you will have enough to bury you with you don't know what I am keeping for you did she?" To this question she answered, "Yes." She was then asked: "Do you think she knew what she was about when she said that?" The answer was, "I don't know." Then this question was put: "What is

your opinion?" She answered, "I think she was all right at that time." She was then asked: "Did you think at that time she knew what she was talking about?" The answer was, "I think she did." She also gave an affirmative answer to the question, "Do you think so now?"

The general rule is that a witness of the class to which these witnesses belonged is not allowed to give his opinion as to the soundness of mind of a testator. *Commonwealth v. Brayman*, 136 Mass. 438, 440. *Cowles v. Merchants*, 140 Mass. 377. *Smith v. Smith*, 157 Mass. 389, 390. *Clark v. Clark*, *ubi supra*.

But we are of opinion that the questions put in this case afford the contestants no ground of exception. Both witnesses had testified to many facts tending to show that the testatrix was of unsound mind. The object of the cross-examination was to show by the first witness that his conduct was inconsistent with his testimony. If the witness at that time had dealt with the testatrix as a person fit for business, that fact would have been admissible as a circumstance to be considered in connection with others. *Bonnemort v. Gill*, 165 Mass. 498. The fact that he did not know of the gift to the son until later, is of no particular significance. There is nothing in the exceptions to show how long it was before the gift was made that the witness left the city. The witness was not asked to give an opinion, but what he thought at that time about the mental capacity of the testatrix to make a gift.

There can be no objection to any of the questions put to Bridget Welch except the one calling for her opinion when a certain remark was alleged to have been made by the testatrix. But the whole object of the questions was to show how the testatrix appeared to the witness at the time in question, and thus to show the improbability of the previous statements made by the witness. For this purpose we are of opinion that the cross-examination was legitimate, though it is apparent that the result might have been reached in a less questionable manner.

When evidence admissible for one purpose is inadmissible for another upon which it would have some bearing apart from the rules of law, it must be assumed that the tribunal of fact considers it only upon those issues which it legitimately affects. In this case it must be assumed that the judge took these expres-

sions of opinion into account only so far as they tended to contradict premises seeming to lead to a different conclusion, and not as evidence tending in itself to establish sanity.

The remaining question relates to the admission of a question put to the witness Dacey. This witness was a niece of the testatrix, and a daughter of Michael J. Welch. She went to Dr. Greene's in 1880, and was there for a year and a half, while the testatrix was a servant there. She testified to many peculiar actions of the testatrix, particularly during the last six years of her life. She also testified to the testatrix's using language towards Dr. Greene which would naturally call for remonstrance on his part, and to her disobeying his orders. This question was put to the witness on cross-examination: "Did you ever hear Dr. Greene find any fault with your aunt during all the time you were there, and if so, what did he say?" The question was admitted for the purpose of contradicting the story told by this witness on her direct examination. The witness then testified to a number of times when Dr. Greene found fault with the testatrix. We are of opinion that the question was clearly admissible.

In the opinion of a majority of the court, the order must be
Exceptions overruled.

D. PRESTON ATWOOD vs. KATE N. WALKER.

Hampden. December 5, 1900. — September 18, 1901.

Present: HOLMES, C. J., KNOWLTON, LATHROP, HAMMOND, & LORING, JJ.

Conflict of Laws.

The defendant agreed to convey to the plaintiff for the price of \$6,000 certain land and buildings in Massachusetts, and the contents of the buildings. The contract was made in New York and the deed was to be delivered and the money paid at the office of the defendant's agent there. The defendant was unable to give a good title, but made the contract in good faith being unaware of the defect. By the law of New York the plaintiff could recover in such a case only nominal damages and expenses, while in Massachusetts he could recover his loss of profit. *Held*, that the measure of damages was to be determined by the law of New York where the contract was made and to be performed, and that there was nothing in our procedure or mode of administering remedies to make these damages more or less.

CONTRACT for breach of an ageement to convey to the plaintiff certain real estate in Belchertown in the county of Hampshire and certain personal property contained in the house and barn on the premises for the price of \$6,000. Writ dated June 3, 1896.

At the trial in the Superior Court, before *Maynard*, J., the jury returned a verdict for the plaintiff in the sum of \$7,271; and the defendant alleged exceptions, which are stated in the opinion of the court.

E. H. Lathrop, for the defendant.

J. B. Carroll & W. H. McClintock, for the plaintiff.

LATHROP, J. 1. The first question arising in the case is whether the defendant has any ground of exception to the refusal of the judge of the Superior Court to give the three instructions requested, and to the ruling given. It may be admitted that enough does not appear in the bill of exceptions as originally allowed; but enough appears from the amended bill of exceptions to show that the points were duly taken at the trial that the contract in question was a New York contract, and that damages for a breach of it should be assessed in accordance with the rule established in New York, and not by the rule in Massachusetts. It also appears that the defendant's counsel was about to read authorities, which he stated established the New York rule, when the judge said he did not care to hear them, and that, whatever might be the New York rule, he should instruct the jury to assess the damages in accordance with the rule established in Massachusetts. The bill of exceptions sets forth that the defendant states that the authorities were as follows, giving a list of them, and the judge adds that he has no doubt of the correctness of the statement, but has no minutes in regard to the authorities, and no memory further than that authorities were produced.

It seems to us clear that it is open to the defendant to argue the questions of law presented. The defendant was cut off from putting in evidence as to the law of New York, the judge considering it immaterial on the question of damages. We are of opinion that it sufficiently appears by the amended bill of exceptions what this evidence was.

2. Coming to the merits of the case, the action is brought for

breach of a contract to convey to the plaintiff certain land and personal property situated in Belchertown in the county of Hampshire, in this Commonwealth. The purchase price was \$6,000. The value of the personal property, as agreed for the purposes of the trial, was \$2,000. The plaintiff was a resident of New Haven, Connecticut, temporarily residing in Springfield, and the defendant was a resident of New York. The plaintiff and the defendant never met, and the negotiations on the part of the defendant were conducted by William Man of New York city, and in New York, who was the agent and attorney of the defendant there. There were various letters between the plaintiff and Man, which contain the alleged contract; and there were verbal negotiations between the plaintiff and Man at the office of the latter in New York. The defendant was unable to give a good title to the real estate without fault on her part. It appears from the testimony of the plaintiff that the deed was to be delivered and the money paid at the office of Mr. Man in New York.

We are of opinion therefore that the judge should have given the first instruction requested, namely: "Upon all the evidence, the jury must find that the contract was made in New York and to be executed there." We infer that the judge did not give this instruction because he did not consider it material.

3. The second and third instructions requested may be considered together, and were as follows: "2. If the jury find that the contract for the sale of the real estate was made in New York, and to be executed there, and the defendant, believing herself to have a good title, agreed to convey the same, believing that she was able so to do, the plaintiff can recover no damages except his reasonable counsel fees for examining title and necessary expenses connected therewith. 3. If the contract was made in New York by the defendant, and to be executed there, and was made by her in good faith, the contract price is conclusive, and the plaintiff having paid nothing can recover nothing."

The presiding judge refused to rule as requested, but instructed the jury that if the contract was made and the defendant failed to carry it out, or refused so to do, by reason of inability to give a good title, the plaintiff could recover the

amount, if any, by which the fair market value of the real estate exceeded, if any, the purchase price. The jury found for the plaintiff in the sum of \$7,271.

The defendant's exceptions are not only to the refusal to rule as requested, but also to the ruling given. It is apparent from the amount of the verdict that if there was error on the part of the judge the defendant has a very substantial grievance.

The first question is as to the law of New York, and this is to be determined from the authorities put in evidence by the defendant, the plaintiff having put in no evidence on this subject. An examination of the authorities cited shows that in New York, in an action for breach of an agreement to convey land, if the defendant has acted in good faith, believing that he had a good title, and he is unable to convey on account of a defect in his title, only nominal damages can be recovered. *Baldwin v. Munn*, 2 Wend. 399. *Peters v. McKeon*, 4 Denio, 546. *Conger v. Weaver*, 20 N. Y. 140. *Margraf v. Muir*, 57 N. Y. 155. *Cockcroft v. New York & Harlem Railroad*, 69 N. Y. 201.

Where the vendee has paid the purchase money in whole or in part, so much as is paid may be recovered back. *Fletcher v. Button*, 6 Barb. 646. So, too, the vendee may recover for the expense of examining the title, if any such expense has been incurred. *Northridge v. Moore*, 118 N. Y. 419.

If, however, a person contracts to sell lands which he knows at the time he has not the power to sell and convey, he is liable to make good to the vendee the loss of his bargain; and it does not excuse the vendor that he may have acted in good faith, and believed when he entered into the contract that he would be able to procure a good title for his purchaser. *Pumpelly v. Phelps*, 40 N. Y. 59.

There is nothing in this case to show that the defendant acted in bad faith or that she knew of the defect in her title. The second request states the law in New York with substantial accuracy, as we understand the facts of the case. The third request states the law in New York too broadly.

The New York decisions follow the English rule as laid down in *Flureau v. Thornhill*, 2 W. Bl. 1078, *Bain v. Fothergill*, L. R. 6 Ex. 59, and L. R. 7 H. L. 158, and in other cases. The English and the New York rule differs from that which generally

prevails in this Commonwealth. *Roche v. Smith*, 176 Mass. 595, 598.

The contract, for breach of which damages are sought in this case, was made in New York, and was to be performed there. The land is situated in Massachusetts, and the action is brought here. The question then arises whether the damages are to be assessed according to the *lex fori*, the *lex rei sitæ*, or the *lex loci contractus*.

As to the *lex fori*, the general rule is that all matters touching the remedy and the mode of procedure, including the admission of evidence and the probative force of evidence, are to be governed by the *lex fori*, with some exceptions. See *Minor, Confl. Laws*, §§ 205 *et seq.* So where interest is allowed as damages for delay, and not as a part of the contract, it has been held that the amount to be allowed depends upon the *lex fori*. *Barringer v. King*, 5 Gray, 9. *Ayer v. Tilden*, 15 Gray, 178. *Hopkins v. Shepard*, 129 Mass. 600. *Clark v. Child*, 136 Mass. 344. See however *Ex parte Heidelberg*, 2 Low. 526.

As to the *lex rei sitæ*, it may be said that it governs in many respects. It has this effect as to the title and seisin; and a deed or will made in one State, purporting to convey or transfer land in another, must be in the form and according to the formalities prescribed by the law of the latter State.

But the distinction between a conveyance of land and a covenant to convey land was pointed out and enforced in *Polson v. Stewart*, 167 Mass. 211, and it was held that a covenant between a husband and wife valid in the State where it was made, but which would have been invalid if made in this Commonwealth, might be enforced here. So in *Glenn v. Thistle*, 23 Miss. 42, where a contract was made in one State for the purchase of land lying in another, and the money was to be paid in the State in which the contract was made, it was held that the *lex rei sitæ* governed as to the title of the land, and the *lex loci contractus* as to the effect of a failure of consideration. See also *Pritchard v. Norton*, 106 U. S. 124.

It is a general rule that in all that relates to the nature, validity and interpretation of a contract, the *lex loci contractus* governs; and that contracts are presumed to be made with reference to the law of the place where they are entered into.

unless they are entered into with reference to the law of some other State or country. See *Baxter National Bank v. Talbot*, 154 Mass. 213, 216, and cases cited.

So the *lex loci contractus* governs in all matters relating to the substantive rights of the parties. Minor, Conf. Laws, §§ 305-308. *Pritchard v. Norton*, 106 U. S. 124. The rights which are given by a contract, and which become fixed and definite immediately upon a breach of the contract, as a necessary result of giving the contract its true meaning and effect, are of a different kind from damages given for delay; and these rights will be enforced by a foreign jurisdiction, if there is nothing in them against its views of public policy.

In the present case the New York contract was to convey a certain piece of land. Its meaning and effect, according to the law applicable to it, is that the defendant, acting in good faith, if it turns out that she is unable to make a good title, will not give to the plaintiff the profits of his bargain, but will save him from loss, and put him in as good a position as if the contract had not been made. This is the true interpretation of the contract, reading it in connection with the law that determines its effect. The contract cannot be made a different contract, or given a greater effect by bringing an action upon it in another jurisdiction. The rights of the parties are fixed by the writing and the law by which it is to be interpreted. When the breach occurred, the details of the damages were immediately fixed by the writing, the law and the conditions then existing. When the present action was brought, it was to recover the damages due under the contract. These damages grew out of a contract and transactions which had been concluded in New York, and were the cause of action on which the plaintiff seeks to recover here. There is nothing in our procedure, or in our mode of administering remedies, that can make these damages more or less. See *Ayer v. Tilden*, 15 Gray, 178, 184, per Hoar, J.; *Ex parte Heidelberg*, 2 Low. 526, 530.

We are of opinion, therefore, that the rule of damages adopted at the trial was wrong, and that the order must be

Exceptions sustained.

INHABITANTS OF MIDDLEBOROUGH vs. NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY & others.

Plymouth. January 25, 1901. — October 10, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, BARKER, HAMMOND, & LORING, JJ.

Damages. Grade Crossing Act.

A town is entitled to have allowed as an item of expense incurred by it in carrying out a decree for the abolition of a grade crossing, under St. 1890, c. 428, the value of a portion of its gas and electric light plant taken for a highway under the decree and any resulting damage to the remaining plant, and this right can be enforced by a petition filed by the town in the proceedings in the Superior Court for the abolition of the grade crossing.

BILL IN EQUITY in the Superior Court by the town of Middleborough praying for a decree, that the value of certain land, buildings and appliances purchased and held by the town for the purpose of its gas and electric light plant, and later taken for a highway by it in carrying out a decree of the Superior Court on the petition of its selectmen for the abolition of a grade crossing under St. 1890, c. 428, and the damages incident to such taking, are items of expense incurred by the plaintiff which it is entitled to have ascertained and apportioned under the act, filed June 19, 1900.

In the Superior Court the defendants demurred, and the case was reserved by *Braley, J.*, for the determination of this court on the bill and demurrers.

The petition alleged, that commissioners duly appointed by the court filed their report, in which they stated that to make the alterations prescribed required the taking of certain parcels of land for highway purposes, including a portion of the land and buildings belonging to the municipal lighting plant, and changing very materially the grade of the street on which those premises abutted; and that the report of the commissioners, with the town's assent, on June 19, 1899, was affirmed by a decree of the Superior Court. On the ground that § 5 of St. 1890, c. 428, gave no remedy for the assessment of damages in such a

case, the bill prayed for relief under the general equity powers conferred by the act.

The case was argued at the bar in January, 1901, and afterwards was submitted on briefs to all the justices.

N. Washburn, for the plaintiff.

J. H. Benton, Jr., for the defendants.

BARKEB, J. Land owned in fee by the town of Middleborough, part of its municipal gas and electric light plant, has been appropriated to another public use, in proceedings for the abolition of certain grade crossings, under St. 1890, c. 428, and the acts in addition thereto. The value of the land so taken, including the damage to that part of the plant not taken, is a contribution at the cost of the plaintiff toward the expense of abolishing the crossings, and if the amount of that contribution cannot be included in the account of expenses, and cannot be decreed to be paid by the railroad company, the Commonwealth and the town, in the proportions fixed under the provisions of St. 1890, c. 428, § 6, the town will receive no compensation for this contribution.

Such a result is contrary to the general intention of our statutes relating to the exercise of the right of eminent domain, which uniformly make provision for compensation to the owner of the land so taken.

It is no less contrary to the general intention of St. 1890, c. 428, which provides for the payment by the Commonwealth, the town or city, and the railroad company, in proportions to be fixed in the proceedings, of the total cost of the alterations, including "all damages," and not merely such damages as can be assessed under the fifth section of the statute. St. 1890, c. 428, § 8.

This court has heretofore declared that the general purpose is "that the whole cost or expense of the entire work, including the cost of the commission and of the auditor, should be paid by the railroad company, the Commonwealth, and the city or town." *Boston & Albany Railroad v. Charlton*, 161 Mass. 82, 84.

In the present case, the defendants contend that the plaintiff can have no compensation for its contribution of the value of that part of its gas and electric light plant taken, or for any damages to what remains of the plant. The contention is not

based upon any claim of power in the Legislature to compel a municipality to give without compensation its property held for one public use to another such use. See *Mount Hope Cemetery v. Boston*, 158 Mass. 509. Damages sustained by the taking of land for a public way in proceedings for the abolition of a crossing are to be paid primarily by the city or town. If the parties interested cannot agree upon the damages, the fifth section of the statute says that the city or town or other party may have them determined by a jury at the bar of the Superior Court, on petition, in the same manner and under like rules of law as damages may be determined when occasioned by the taking of land for the locating and laying out of public ways in such city or town. St. 1890, c. 428, § 5.

But in the present instance, as the plaintiff is both the owner of the land taken and the town in which the way is situated, the plaintiff cannot make an agreement with itself, nor can it maintain a petition for its damages, in which petition the town would be the sole petitioner and the sole respondent. Because of the technical difficulty, which precludes, in this instance, the operation of the remedy for damages provided in St. 1890, c. 428, § 5, the auditor has refused to audit and allow the damages sustained by the taking of the plaintiff's land as an item of expense incurred by the town in carrying out the decree for abolition of the crossings, and so the town has no remedy under the ordinary operation of the statute. If the land had been taken for railroad purposes instead of for a public street, the damages could have been ascertained under the provisions of § 5, in a petition in which the town would have been the petitioner and the railroad company the respondent. This shows that it was not the intention of the statute that land of the town which should be taken for the alterations should be contributed in all instances without compensation.

But the proceedings for the abolition of the crossing are upon the equity side of the court, and besides this there is a section giving the court power in equity to compel compliance with the statute, and to issue and enforce such interlocutory decrees and orders as justice may require. St. 1890, c. 428, § 8.

In the opinion of a majority of the court it was the intention of the Legislature that, when the general and declared purpose

of the statute to have the whole expense of an alteration apportioned could not be carried out under the machinery which in ordinary cases would effect such an apportionment, that purpose should be carried out by the exercise of the equity powers of the court.

The Commonwealth and the railroad companies are both interested in having the amount of the plaintiff's damages fixed at a just sum. While neither the Commonwealth nor the railroad companies could be heard in a petition brought by the town at the bar of the court under St. 1890, c. 428, § 5, even if such a petition could be brought by the town against itself, there is no reason why they could not be admitted as parties to an issue to be tried to determine those damages. Nor is there any difficulty in having that determination of damages made under an issue framed by order of the court sitting in equity and tried as under section five of the act the question of damages would be tried if it were not for the difficulty as to parties. Such a determination, and a further order that the amount of the plaintiff's damages, when determined, shall be marshalled and audited as an expense incurred by the town, and shall be paid in their due proportions by it and by the Commonwealth and the railroad companies, are mere steps in compelling compliance with that provision of the act which directs the total cost of the alterations to be borne by the railroad, the Commonwealth and the city, including all damages, as well as the damages to be ascertained and recovered in the manner provided by the fifth section of the act. Such steps are required by justice, since without them the total actual cost of the alterations cannot, under the other machinery of the act, be imposed where the express terms of the third section of the act impose it. Justice to the town requires that so much of that cost as is represented by the value of its gas and electric light plant as has been taken for the alterations, and any resulting damages to the remaining plant, shall be in part borne by the Commonwealth and the railroad companies. A construction of the section of the act conferring equity power, which would deny jurisdiction to ascertain the plaintiff's damages and order them audited and paid as other expenses incurred under the decree for abolishing the crossings, would be too narrow and strict, and would leave the act to work an injustice which can be avoided.

The plaintiff has a just claim for compensation. The general intention of the statute that it should be paid is clear. The equity power of the Superior Court is capable of justly ascertaining the amount of the claim, and of compelling its payment in the due proportions and by the proper parties. But there is no need of a separate bill for this purpose. The proceedings for the abolition of the crossing are in equity. The better course is to have the necessary equitable relief given in the main proceeding by means of a petition therein, stating the facts which entitle the town to such relief, and asking for such orders as will give it.

The reservation is discharged and the Superior Court directed to allow the plaintiff to amend its bill into a petition in the proceedings for the abolition of the crossing, and, upon such amendment, to entertain the petition and dispose of it in accordance with the construction of the grade crossing acts given in this opinion.

So ordered.

HENRY C. BOWEN & another vs. BOSTON AND ALBANY
RAILROAD COMPANY.

Berkshire. September 10, 1901. — October 15, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, & LATHROP, JJ.

Railroad, Liability for fire. Evidence, Experts.

In an action under Pub. Sts. c. 112, § 214, to recover for the destruction of the plaintiff's mill by fire alleged to have been communicated by a locomotive engine of the defendant, the defendant introduced evidence tending to show that the engines which ran by the plaintiff's mill were equipped with spark arresters and extension fronts and standard netting, and would not and could not throw out sparks so as to set a fire. The plaintiff in rebuttal was allowed against objection, to introduce evidence tending to show that a certain kind of engine used by the defendant which ran by the plaintiff's mill when equipped with spark arresters and netting of the standard kind, all in good condition, would throw out sparks and set fires and had done so; that there were no appliances that would prevent a locomotive under all circumstances from throwing out live sparks and setting a fire; and that an engine with an extension front and a spark arrester with a netting of the kind exhibited would sometimes give out live cinders so as to set a fire. *Held*, that the evidence in rebuttal rightly was admitted, as it bore directly upon the issue, whether an engine of the defend-

ant caused or could have caused the fire. Whether the witnesses possessed the necessary experience and knowledge to qualify them to testify was for the presiding judge to say.

The evidence in this case stated in the opinion was held to warrant a finding of the jury that the fire which destroyed the plaintiff's mill was caused by sparks from one of the defendant's locomotives.

In an action against a railroad company under Pub. Sts. c. 112, § 214, to recover for the destruction of the plaintiff's property by fire communicated by a locomotive engine of the defendant, the plaintiff is not bound to show ordinary care on his part. If the fire was caused by sparks from the defendant's engine, the plaintiff can recover unless his negligence was gross or such as to amount to fraud.

TORT to recover damages on account of the destruction by fire of the grist mill of the plaintiffs with its additions and fixtures and the personal property therein contained, alleged to have been caused by a spark from a locomotive engine of the defendant, the first count being at common law and the second under Pub. Sts. c. 112, § 214. Writ dated June 11, 1898.

At the trial in the Superior Court, before *Maynard*, J., the case was submitted to the jury upon the second count on the sole question whether the fire was caused by sparks from the defendant's engine. The jury found for the plaintiffs. The question of damages was not submitted to them. The defendant alleged exceptions, of which those relied upon at the argument are stated in the opinion of the court.

J. C. Crosby, (*J. F. Noxon* with him,) for the defendant.

H. C. Joyner, (*F. R. Shaw* & *H. L. Harrington* with him,) for the plaintiffs.

MORTON, J. This is an action to recover damages for the burning of the plaintiffs' mill and contents by a fire alleged to have been communicated by the locomotive engines of the defendant. There was a verdict for the plaintiffs, and the case is here on exceptions by the defendant to various rulings and refusals to rule by the presiding judge which we shall consider only so far as relied on by the defendant at the argument, treating the others as waived.

1. The defendant excepted to the admission of certain evidence which the plaintiffs were allowed to introduce in rebuttal tending to show that diamond stack engines with spark arresters and netting of the standard kind, all in good condition, would throw sparks and set fires and had done so; that there were no appliances that would prevent a locomotive under all circum-

stances from throwing out live sparks and setting a fire; and that an engine with an extension front and a spark arrester with a netting of the kind exhibited would sometimes give out live cinders so as to set a fire. We think that this evidence was competent in reply to the testimony introduced by the defendant tending to show that the engines which ran by the plaintiffs' mill on the defendant's road the day before the fire, including one or more diamond stack engines, were equipped with spark arresters and extension fronts and standard netting all in good condition, and would not and could not throw out sparks so as to set a fire. *Ross v. Boston & Worcester Railroad*, 6 Allen, 87. It bore directly upon the issue, which was whether the engines of the defendant caused or could have caused the fire. Whether the witnesses possessed the necessary experience and knowledge to qualify them to testify was for the presiding judge to say.

2. The defendant excepted to the refusal of the court to rule that the plaintiffs were not entitled to recover upon the second count and to direct a verdict for the defendant on that count. In effect the defendant asked the court to rule that there was no evidence that the fire was caused by the defendant's locomotives. We think that the court rightly refused so to rule. The plaintiffs' mill consisted of a main building of wood with a slated roof one hundred and twelve feet long by forty-one feet wide three stories high, with an addition, also of wood and with a slated roof of the same height and width extending westerly about sixty feet from the centre of the main building. The main building was about fifty feet westerly of the defendant's main track and was nearly parallel to it. The fire occurred between three and four o'clock on the morning of July 9. There was testimony tending to show that on the day before a number of trains had passed by the mill including two gravel trains which were hauling gravel from a pit not far away, the last train having passed by between eight and nine o'clock in the evening. There was also testimony that the wind was blowing strongly from the east the day before the fire, that one or more of the engines threw sparks and smoke and cinders which were blown towards the mill and to a much greater distance than the mill; that there had been no rain for several days; that there had been no fire in the mill; that the mill was left securely fastened up the evening before,

and was found so by those who got to the fire first; and that going towards the south there was an up grade by or in the vicinity of the plaintiffs' mill which might compel an engine with a heavy load to work hard. Without going into the evidence further in detail we deem it enough to say that there was testimony warranting the jury in finding that the fire was caused by sparks from the defendant's locomotives. It was for the jury to give such weight as they thought it entitled to, to the argument drawn from the time that elapsed between the passing of the locomotives and the discovery of the fire. We cannot say that the time was so great as to establish conclusively that the fire could not have been caused by sparks from the defendant's locomotives, or that that was not on the whole the most natural and reasonable explanation of its origin. *McGinn v. Platt*, 177 Mass. 125. *Wild v. Boston & Maine Railroad*, 171 Mass. 245. *Wall v. Platt*, 169 Mass. 398.

3. The defendant in substance asked the judge to rule that the burden was on the plaintiffs to show that they were in the exercise of due care, and that if they were guilty of contributory negligence they could not recover. The judge refused to rule as thus requested, and instructed the jury that the question of due care on the part of the plaintiffs, meaning manifestly ordinary care, did not enter into the case, but that negligence on their part in order to prevent a recovery must be gross, or such as to amount to fraud. We think that the ruling of the court was right. *Wild v. Boston & Maine Railroad*, 171 Mass. 245. *Wall v. Platt*, 169 Mass. 398. *Boston Excelsior Co. v. Bangor & Aroostook Railroad*, 98 Maine, 52. *Rowell v. Railroad*, 57 N. H. 132. *Mathews v. St. Louis & San Francisco Railway*, 121 Mo. 298. *West v. Chicago & Northwestern Railroad*, 77 Iowa, 654.

In view of the danger of fire from locomotives, the Legislature, it seems to us, has imposed upon railroad corporations a liability which is almost that of insurers,—the idea being, we think, that the parties who are authorized to use so dangerous an agency, and who have the control of it and the power to adopt safeguards in regard to its use, should bear the loss that may ensue from fires that are caused by locomotives, rather than those who have nothing to do with the management and control of them, and who are in the lawful enjoyment and occupation of

their property. The rule of liability laid down by the statute is analogous, it seems to us, to that in the case of one who brings upon his premises a dangerous and active agency and who is bound at his peril to keep it there. As the court says in *Ingersoll v. Stockbridge & Pittsfield Railroad*, 8 Allen, 438, 440, "The Legislature have chosen to make it a condition of the right to run carriages impelled by the agency of fire, that the corporation employing them shall be responsible for all injuries which the fire may cause." The defendant relies upon *Ross v. Boston & Worcester Railroad*, 6 Allen, 87. But the jury found in that case that the plaintiff was in the exercise of ordinary care and prudence, and the question whether the instructions were correct was not considered by this court.

Exceptions overruled.

MARY E. PARKER vs. MIDDLESEX MUTUAL ASSURANCE
COMPANY.

SAME vs. FARMERS' FIRE INSURANCE COMPANY.

Berkshire. September 10, 1901. — October 15, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Insurance, Fire, Sworn statement to be "forthwith rendered."

Buildings insured against fire under a policy in the Massachusetts standard form were destroyed by fire on October 8. The sworn statement required to be "forthwith rendered to the company" was mailed to it by the assured on December 8, and was received on December 10 or 12. The assured was a woman whose husband was "somewhat of an invalid." On October 7, she was called to visit a sick grandchild who died on October 9. The severe illness of the child's mother detained her until the latter part of October. She returned to a village near her destroyed home and remained until the day after election in November. She then moved to another State and was ill there for about two weeks. In an action on the policy, it was held, that there was no evidence that would warrant a jury in finding that she used due diligence in sending the statement as soon as she reasonably could, which was a condition precedent to recovering on the policy. Assuming that the illness and death of the plaintiff's grandchild, the illness of her daughter and her own illness excused her from doing anything about preparing and sending the statement during the entire period of each illness, there was nothing to show that she used due diligence to send the statement during the intervals. *Harnden v. Milwaukee Mechanics' Ins. Co.* 164 Mass. 882 explained.

TWO ACTIONS OF CONTRACT by the same plaintiff against two different insurance companies, each to recover on a policy of fire insurance in the Massachusetts standard form for the loss by fire of a dwelling house and contents and barns in the town of Sandisfield. Writs dated April 8, 1899.

At the trial in the Superior Court, before *Dewey, J.*, the judge refused to order verdicts for the defendants, but, after having read to the jury a portion of the opinion in *Harnden v. Milwaukee Mechanics' Ins. Co.* 164 Mass. 382, ruled that there was no evidence to warrant a finding that either of the defendants had waived its right to require the filing of proofs of loss in accordance with the terms of the policy, and that in each case the burden was upon the plaintiff to prove that she complied with the provisions in the policy according to the legal meaning of it. "And, of course, according to this decision which I have read to you, she must prove that in the sense of the policy, she furnished the proofs of loss 'forthwith'; provided she used due and reasonable diligence in regard to it, and in furnishing it."

The jury found for the plaintiff in the sum of \$783.85 in each case; and the defendant alleged exceptions which, after the death of *Dewey, J.*, were allowed by *Fox, J.*, under St. 1894, c. 412.

The requirement of proof of loss in each of the policies was in accordance with St. 1894, c. 522, § 60, in the following form: "In case of any loss or damage under this policy, a statement in writing, signed and sworn to by the insured, shall be forthwith rendered to the company, setting forth the value of the property insured, the interest of the insured therein, all other insurance thereon, in detail, the purposes for which and the persons by whom the building insured, or containing the property insured, was used, and the time at which and manner in which the fire originated, so far as known to the insured."

The plaintiff relied on the following facts to excuse her delay in presenting the required statements. The fire occurred on October 3, 1898. The plaintiff's husband was somewhat of an invalid, and the plaintiff was troubled with asthma and heart difficulty and suffered much at the time of the fire from excitement and her efforts in saving her property. She and her husband went home with a neighbor and the furniture which was

saved was moved to his house. On October 4, the day after the fire, the plaintiff sent a telegram to each of the defendants notifying it of the loss. The plaintiff testified, that on October 7 she received a telegram from her son saying that his child was ill, and that he wanted her to go to his home in Dresden, New York; that she went on the morning of the 8th, and the child died on the morning of the 9th; that she stayed at her son's in Dresden, New York, until some time in the latter part of October, to care for her daughter who was very ill, not thinking it prudent to leave her sooner; that she then returned to New Marlborough in this Commonwealth, which is the nearest village to the property that was burned; that she remained at New Marlborough until the day after election in November, 1898, when she moved her goods and went to Dresden, New York, where she was ill for about two weeks.

The sworn statements were mailed by the plaintiff on December 8, 1898, and were received by the defendants respectively on December 10 and 12.

H. V. Cunningham & F. W. Brown, for the defendants.

A. C. Collins, for the plaintiff.

KNOWLTON, J. The principal question in these cases is whether there was any evidence on which to rest a finding that the plaintiff complied with the requirement in each of the policies that in case of loss "a statement in writing, signed and sworn to by the insured, shall be forthwith rendered to the company, setting forth the value of the property insured, the interest of the insured therein, all other insurance thereon," etc. That such a requirement is valid, and that compliance with it is a condition precedent to a right to recover, is unquestioned.

The fire occurred on October 3, 1898. No such statement in writing was rendered to either defendant until December 8, 1898. On that day the statements were mailed, one of which was received on December 10 and the other on December 12. The true meaning of such a requirement in a policy is that the statement shall be sent as soon as the exercise of reasonable diligence will enable the assured to send it. When it is contended that a statement was not sent in time under such a requirement, the inquiry always is whether the insured, whose duty it was under the contract to send the paper as soon as he

reasonably could, has used due diligence to send it promptly. If there is no dispute in regard to the facts, what is due diligence is a question of law for the court. *Smith & Dove Manuf. Co. v. Travelers' Ins. Co.* 171 Mass. 357. *Kimball v. Howard Ins. Co.* 8 Gray, 33. *Smith v. Newburyport Ins. Co.* 4 Mass. 668. *Howland v. India Ins. Co.* 131 Mass. 239. *Bennett v. Lycoming County Mutual Ins. Co.* 67 N. Y. 274. *Mispelhorn v. Farmers' Ins. Co.* 53 Md. 473. *Insurance Co. of North America v. Brim*, 111 Ind. 281. The decision in *Harnden v. Milwaukee Mutual Ins. Co.* 164 Mass. 382, rests in part on matters which are recited in the opinion, as follows: "Subsequently the defendant . . . agreed that, if the first proof of loss was delivered to Breed with a promise on his part that he would forward it, the jury might find for the plaintiff. . . . It would seem as though counsel for the defendant did not care to argue that, under the circumstances, due diligence had not been used by the plaintiff in rendering the statement, if one was rendered the last of January, but preferred to rest on the contention that the first proof was not delivered to Breed at all." In considering the effect of this case as an authority, these recitals should be kept in mind.

Giving full effect to all the evidence relied on by the plaintiff to excuse the delay in sending the statements, and treating it as literally true, we are of opinion that there is nothing in it which would warrant the jury in finding that she used due diligence to send them as soon as she reasonably could. The judge rightly ruled that there was no evidence to show that either of the defendants waived its right to have the statement sent according to the terms of the policy. The plaintiff was bound to know, and the evidence tends to show that she did in fact know, the terms and legal effect of this requirement in the policy. She waited sixty-six days after the fire before mailing a statement of loss to either company. She relies upon the illness of her grandchild, and his death which occurred on October 9, and the illness of the child's mother, which was such that she did not think it prudent to leave her until the latter part of October, and her own illness for about two weeks in the middle or last part of November, as reasons for failing to send the statements of loss earlier. If we assume in favor of the plaintiff, without deciding, that the illness and death of her grandchild and the illness of her

daughter and her own illness excused her from doing anything about the business of preparing and sending the statements during the entire periods in which there was any illness of either of them, there is no evidence to show that she used due diligence to send the statements during the intervals when, so far as appears, she easily could have prepared and sent them. No circumstances are testified to which show a sufficient reason for neglecting her duty in this particular for so long a time. Such neglect for a much shorter period has often been held fatal to the right of the insured to recover. *Swain v. Security Live Stock Ins. Co.* 165 Mass. 321, 323. *Smith & Dove Manuf. Co. v. Travelers' Ins. Co.* 171 Mass. 357. *Trask v. State Fire & Marine Ins. Co.* 29 Penn. St. 198. *Inman v. Western Ins. Co.* 12 Wend. 452. *Quinlan v. Providence Washington Ins. Co.* 133 N. Y. 356. *Brown v. London Assurance Co.* 40 Hun, 101. *Whitehurst v. North Carolina Mutual Ins. Co.* 7 Jones, (N. C.) 433. *Railway Passenger Assurance Co. v. Burwell*, 44 Ind. 460. *LaForce v. Williams City Ins. Co.* 43 Mo. App. 518.

The question whether there was due diligence has been submitted to a jury in cases where the evidence was doubtful or conflicting, and where, upon the view of it most favorable to the plaintiff, the court would find due diligence. See *Home Ins. Co. v. Davis*, 98 Penn. St. 280; *Carpenter v. German American Ins. Co.* 135 N. Y. 298; *Donahue v. Windsor County Mutual Ins. Co.* 56 Vt. 374.

While some of the evidence objected to was not competent as having any binding effect against the defendants, we have assumed that it might be considered for what it was worth, as a part of the history of the plaintiff's situation and circumstances, so far as it had any tendency to throw light on the question whether she acted with due diligence.

Exceptions sustained.

COMMONWEALTH vs. DENNIS O'BRIEN.

Hampshire. September 17, 1901. — October 15, 1901.

Present: HOLMES, C. J., KNOWLTON, LATHROP, & BARKER, JJ.

Lewd, Wanton and Lascivious Person. Evidence, Admissions.

Where on a complaint, under Pub. Sts. c. 207, § 29, charging the defendant with being a "lewd, wanton and lascivious person in speech and behavior" the proof is confined to the conduct of the defendant on a single occasion, the conduct proved is not the offence but only a ground of inference that the defendant is a person of the kind described, and everything that bears upon the inference to be drawn from his conduct should be admitted. If, therefore, a defendant is shown to have been guilty of lascivious conduct in a room with women, he is entitled to prove that he went to the room with innocent intent.

On the trial of a complaint, under Pub. Sts. c. 207, § 29, against a married man for being a "lewd, wanton and lascivious person," the evidence related to the conduct of the defendant on a single occasion and warranted the inference that he was then practising personal familiarities or having intercourse with a certain woman. *Whether* he should have been allowed to show a judgment of his acquittal upon an indictment for adultery on this same occasion, *quære*.

In a criminal case the defendant's failure to reply to a statement made in his presence concerning a material matter and under such circumstances as to call for a reply or denial, is evidence against him.

HOLMES, C. J. This was a complaint alleging that the defendant "during the three months next before the finding of this complaint was a lewd, wanton and lascivious person in speech and behavior." Pub. Sts. c. 207, § 29. The evidence was that on one night at two o'clock the police found the defendant in his shirt, trousers and stockings, in a room with two women who were but slightly clothed and two men, one of whom was dressed and the other in bed. The party had had food and whiskey. Lewd talk was heard before the police were admitted, and also an exclamation which was explained by one of the women in the defendant's presence in such a way as to warrant the inference that he was practising personal familiarities if not having intercourse with the other.

The defendant testified that he went to the room with innocent intent, and to corroborate his testimony offered evidence that his wife had told him not to come home and that she should not admit him, and that he was invited to this room as a place to pass the night in consequence of his trouble. This

evidence was rejected and the defendant excepted. The defendant also excepted to the exclusion of a judgment of acquittal upon an indictment for adultery on this same occasion, and to a refusal to rule that upon the whole evidence the defendant must be acquitted.

The statute punishes being a certain kind of person, not doing a certain overt act, as was recognized by the words which we have quoted from the complaint. See *Commonwealth v. Parker*, 4 Allen, 313, 314. When, then, as in this case, the proof is confined to conduct on a single occasion, it does not sustain the complaint unless the conduct fairly warrants an inference that the defendant is a person of the kind described. See *Commonwealth v. Hopkins*, 2 Dana, 418, 420. And it follows that as the conduct proved is not the offence but only a ground of inference, everything that bears upon the inference to be drawn from it should be admitted. If we assume without deciding that the defendant's being in the room and doing whatever he may have done, unexplained, was some evidence against him, the inference that those facts were indicative of character might be affected very much by finding out how he happened to get there. If a man comes to a room innocently and unexpectedly finds there a woman who is willing to tempt him, something more than his remaining there an hour and practising personal familiarities short of intercourse with her must be proved in order to bring him within the act. We are of opinion that the corroborative evidence offered by the defendant should have been admitted.

We are not prepared to say that the acquittal from adultery should have been admitted, and it is not necessary to decide the point.

The explanation of a previously heard exclamation given by one of the women in the defendant's presence properly was ruled to be evidence against him, if found to concern a material matter and to have been made under such circumstances as to call for a reply or denial. *Commonwealth v. Galavan*, 9 Allen, 271. *Drury v. Hervey*, 126 Mass. 519, 522.

Exceptions sustained.

J. B. O'Donnell, for the defendant.

J. C. Hammond, District Attorney, for the Commonwealth.

URSULA LAPOINTE vs. BOSTON AND MAINE RAILROAD.

Hampshire. September 17, 1901. — October 16, 1901.

Present: HOLMES, C. J., KNOWLTON, LATHROP, & BARKER, JJ.

Negligence, On railroad, Contributory.

A passenger who is injured in attempting to alight from a railroad train after it has stopped at a station and started again, knowing that the train is in motion when he steps off, is not in the exercise of due care and cannot recover from the railroad company.

In an action to recover for injuries sustained by the plaintiff, a woman sixty-one years old, in falling from a train when she was attempting to alight, after the train had stopped at her station and started again, it appeared, that the accident happened about three o'clock in the afternoon, that the plaintiff wore a veil and carried a handbag and a bundle containing some books tied with a string, that when she and other passengers started to leave the car one of the books slipped out, that she stooped and picked it up and while walking to the end of the car was trying to get the book under the string, that before reaching the end of the car she saw a brakeman come into the car, shut the door and sit down, that the other alighting passengers at this time were on the platform of the station, that she opened the door, stepped out on to the platform of the car, and began to descend the steps on the opposite side from the station platform, saw that the train was moving, either stepped off or fell off of the lower step after the train had started, and struck the ground some distance from the end of the station platform. *Held*, that a verdict should have been ordered for the defendant; that the plaintiff either stepped off the train when she knew it was in motion or, if she fell, descended the steps when if she had used her faculties she could not have failed to notice that the cars were moving, and in either case was not in the exercise of due care.

TORT by a passenger for injuries alleged to have been caused by the sudden starting of a train of the defendant when the plaintiff was about to alight therefrom. Writ dated March 19, 1900.

At the trial in the Superior Court, before *Mason*, C. J., the judge refused to rule that the plaintiff was not entitled to recover, and submitted the case to the jury who returned a verdict for the plaintiff in the sum of \$4,000. The defendant alleged exceptions now sustained by the court upon the undisputed evidence which is stated in the opinion.

W. G. Bassett, (*E. L. Shaw* with him,) for the defendant.

J. C. Hammond, for the plaintiff.

LATHROP, J. The plaintiff was a passenger on a train of the defendant company, and sustained injuries by falling from the train while she was attempting to alight, after the train had stopped at a station and had started again.

The undisputed facts in the case are that the plaintiff, a woman sixty-one years old, took the train at Northampton intending to go to Belchertown, at fifteen minutes after two o'clock in the afternoon of January 6, 1900. On reaching Belchertown, the name of the station was called, and she and other passengers arose and started for the forward end of the car. She was encumbered by a handbag and a bundle containing some books, tied up by a string. One of the books slipped out and she stooped to pick it up, and while walking to the end of the car was trying to get the book under the string. Before reaching the end of the car she saw a brakeman come into the car, shut the door and sit down. The other passengers at this time were on the platform of the station. She opened the door, stepped out on to the platform of the car, and began to descend the steps to the left, instead of to the right, where the platform of the station was, saw that the train was moving, and either stepped off or fell off the lower step after the cars had started. The place where she struck the ground was some distance from the end of the platform of the station. This platform was one hundred and thirty feet long, and the forward end of the car was about the middle of it while the cars were at the station. The accident took place about three o'clock in the afternoon.

On the evidence we are of opinion that the court below should have ruled, as requested by the defendant, that the plaintiff was not entitled to recover. While the plaintiff's evidence was contradictory as to whether she stepped off the car after the train had started, or fell off, in either case she admits that she knew that the train was then in motion. If she stepped off, it is clear that she cannot recover. *England v. Boston & Maine Railroad*, 153 Mass. 490. If she fell off, it is apparent that the place where she fell shows that the train was in motion before she opened the door and stepped upon the platform; and that if she had used her faculties she could not have failed to notice that the cars were moving. In fact the plaintiff admitted that she could

not see very well because she had a veil on, and that her veil hindered her from seeing, quickly enough to save herself, that the train was really moving. The accident was not at night but in the middle of the afternoon, and there was nothing to hinder her from knowing that the train had started.

Exceptions sustained.

CHARLES F. BERRY vs. FRANK WASSERMAN & others.

Suffolk. January 15, 1901. — October 17, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, BARKER, HAMMOND, & LORING, JJ.

* *Attachment, Bond to dissolve. Bond, Construction.*

- A bond to dissolve an attachment on land under Pub. Sta. c. 161, § 66, is not invalidated by a failure properly to describe the land, if the name of the action and the attachment are referred to, the description of the property necessarily appearing in the officer's return.
- In a bond to dissolve an attachment, given in 1900, a reference to Pub. Sta. c. 171, § 23, and St. 1888, c. 405, in regard to special judgments in case of proceedings in insolvency, is not inapplicable, for when such bond is given it cannot be known that the bankruptcy act of 1898 will not be repealed before final judgment, and, in case of a repeal, these provisions might be important.
- A bond to dissolve an attachment of land of the principal obligor on a writ against a third person was given and accepted without first having an appraisal of the attached property under Pub. Sta. c. 161, § 126. The condition of the bond began as follows: "if the above bounden F. W. shall pay to the plaintiff in said action the amount, if any, that he may recover in the action of *B. v. R. W.*, within thirty days after the final judgment in said action; and after said B. shall establish his title to the land in a writ of entry against said F. W." *Held*, that by providing for the payment of the amount recovered in the final judgment "after said B. shall establish his title to the land in a writ of entry" and by executing the bond without an appraisal of the land the obligor waived the requirement for an ascertainment of the value of the land and substituted the amount of the final judgment for the appraisal, that the subsequent provisions of the bond, taken in connection with the statutes made it necessary to treat the words "within thirty days" in the condition of the bond as contradictory and immaterial, and that the bond would be binding for the payment of the judgment on the establishment by the plaintiff of his title to the land attached in a writ of entry, in accordance with the provisions of Pub. Sta. c. 161, § 126, that being a condition precedent to recovery on the bond.

CONTRACT upon a bond given to dissolve an attachment of land of the principal obligor on a writ against third persons. Writ dated May 9, 1900.

The bond was dated January 3, 1900, and ran to the plaintiff, Charles F. Berry. The recital and condition were as follows: "The condition of this obligation is such, that whereas said Berry has caused the goods and estate of said Frank Wasserman, to the value of two thousand dollars, to be attached on special precept in a civil action, by virtue of a writ bearing date the 25th day of April, A. D. 1899, and returnable to the Municipal Court of the City of Boston for Civil Business, to be holden at Boston, within the county of Suffolk in said Commonwealth, on the sixth day of May, A. D. 1899; in which writ said Berry is plaintiff, and Rebecca Wasserman and David Wasserman are defendants. And whereas said Frank Wasserman wishes to dissolve the said attachment according to law.

"Now, therefore, if the above bounden Frank Wasserman shall pay to the plaintiff in said action the amount, if any, that he may recover in the action of Berry *versus* Rebecca Wasserman *et al.*, within thirty days after the final judgment in said action; and after said Berry shall establish his title to the land in a writ of entry against said Frank Wasserman, he, said Frank, having the record title thereto at the time of said attachment, the sum ascertained to be the value of the land, less the sum unpaid on the mortgages outstanding thereon at the time of said attachment, or so much thereof as shall satisfy the amount, if any, which said Berry shall recover upon final or special judgment after said Berry shall establish his title to said land as aforesaid, under Chapter 171 of the Public Statutes, in the suit of said Berry against said Rebecca and David Wasserman; the sum, if any, for which said judgment shall be entered; and also, if the above-named sureties shall pay to the said Berry within thirty days after the entry of any special judgment in said action, after said Berry shall establish his title to said land as aforesaid, in accordance with Section 1 of Chapter 405 of the acts of the Commonwealth of Massachusetts, of the year eighteen hundred and eighty-eight, the sum, if any, for which said judgment shall be entered, and after said Berry shall establish his title as aforesaid, then the above written obligation shall be null and void; otherwise to remain in full force and virtue."

The Superior Court sustained a demurrer to the declaration

and gave the plaintiff leave to amend. The amended declaration contained the following: "And the plaintiff further says that no sum has been ascertained to be the value of any land or estate attached in said action the record title whereof stood in the name of Frank Wasserman at the time of attachment; and that there is no court or tribunal wherein a writ of entry to establish his right to recover on said bond can be maintained; and that by reason of the failure and omission of the defendants to have the value of the land ascertained and to have the sum ascertained to be the value of such land inserted in the condition of said bond, the defendants have waived the bringing of any writ of entry by the plaintiff before suing on said bond; and have made the bringing of an effective writ of entry impossible."

The declaration further averred, that on April 2, 1900, the plaintiff recovered judgment in the action named in the sum of \$1,367.67 damages and \$38.99 costs, that the judgment had never been satisfied or reversed and that no part thereof had been paid for more than thirty days after the final judgment in said action or up to the bringing of this action.

The defendants demurred to the amended declaration and among other causes for demurrer alleged, "that it does not from said declaration appear that the plaintiff has performed the conditions precedent to the right of the plaintiff relying thereon in said bond contained, nor does the plaintiff set forth his excuse for the non-performance thereof, nor does the plaintiff set forth such facts as would be a waiver of said conditions."

The Superior Court sustained the demurrer and gave judgment for the defendants; and the plaintiff appealed.

The case was argued at the bar in January, 1901, and afterwards was submitted on briefs to all the justices.

G. W. Estabrook, for the plaintiff.

E. B. Goodsell, for the defendants.

KNOWLTON, J. The question in this case is what construction shall be put upon the bond declared on. The plaintiff contends that the greater part of the condition, to wit, all after the words "after the final judgment in said action," should be disregarded as contradictory and meaningless, and that there was a breach of the condition on the failure of the defendant, Wasser-

man, to pay the amount recovered in the action within thirty days after the final judgment. The instrument was badly drawn, and no construction of it is possible under which every one of its provisions, taken separately, can be given full effect; but all of its parts should be considered together, and we should give it effect, according to the manifest intention of the parties, if we can ascertain their meaning.

On its face it discloses a purpose on the part of a person provided for by the Pub. Sts. c. 161, § 128, to avail himself of his rights under that statute. It sets forth that the principal obligor's property has been attached on a writ against third persons. The land is not described in the bond as it should be, but this omission does not invalidate the instrument, inasmuch as the case and the attachment are referred to and are a part of the original record, and the description of the property necessarily appears in the officer's return.

The bond states that "Frank Wasserman wishes to dissolve the said attachment according to law." The only law to which he could have referred in the statement is the Pub. Sts. c. 161, § 128. Nearly all of the condition of the bond is made up of provisions required by this section. It is said that the reference to the requirements of the Pub. Sts. c. 171, in regard to special judgments, and to the St. 1888, c. 405, §§ 1 and 2, is inapplicable, because of the enactment of the United States bankruptcy act of 1898, c. 541. But this is not so; for when such a bond is given it cannot be known that the bankruptcy act will not be repealed before the final judgment, and in case of a repeal, these provisions might be important.

The parties completed this bond and it was accepted and acted upon without first having an appraisal of the attached property under the Pub. Sts. c. 161, § 126. What effect should this have upon the construction to be put upon their contract? The most natural construction, and that which in view of the first three lines of the condition would seem to carry out their meaning, is to say that by providing for the payment of the amount recovered in the final judgment "after said Berry shall establish his title to the land in a writ of entry," etc., and by executing the bond without an appraisal of the land the obligors waived the requirement for an ascertainment of the value of the land, and

substituted the amount of the final judgment for the appraised value. See *Commonwealth v. Costello*, 120 Mass. 358. Perhaps the amount sued for was much less than the value of the land. We are of opinion that the subsequent provisions of the bond, taken in connection with the statutes, make it necessary to treat the words "within thirty days" in the fourth line of the condition, as contradictory and immaterial, and that the amount of the final judgment stands for the sum ascertained to be the value of the land, the parties having virtually agreed to go on without an appraisal, and that the bond is binding for the payment of this judgment on the establishment by the plaintiff of his title to the land attached, in accordance with the provisions of the Pub. Sts. c. 161, § 128. It is to be noticed that in each of the references to the special judgments under Pub. Sts. c. 171, and under the St. 1888, c. 405, respectively, there is in the bond an express condition that the plaintiff shall first establish his title by a writ of entry.

The construction contended for by the plaintiff virtually strikes out of the bond all after the fourth line of the condition, for if there is a requirement to pay the amount of the judgment absolutely within thirty days all the rest of the condition is meaningless.

Because there is in the declaration no averment that the plaintiff has established his title by a writ of entry, the demurrer was rightly sustained.

Judgment affirmed.

EDWARD B. KELLY vs. WAKEFIELD AND STONEHAM STREET
RAILWAY COMPANY.

Middlesex. January 16, 17, 1901. — October 17, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

Negligence, In driving, Contributory.

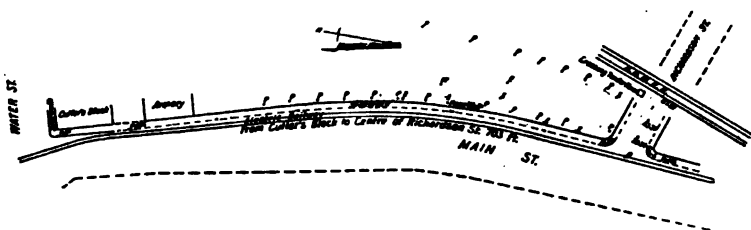
In an action against a street railway company for injuries caused by the plaintiff being run into by a car of the defendant, it appeared by the plaintiff's evidence, that the plaintiff was driving in an open wagon approaching a street along which the defendant's tracks ran; that when eighty feet distant from the tracks he had a clear view of the tracks for a distance of from three hundred to three hundred and fifty feet from the corner he was approaching; that he looked in both directions and no car was in sight; that from this point until his horse was actually upon the track his view was so obstructed by trees that he could not see a car coming from the right; that when on the track he saw a car ten or twelve feet away coming from the right at the rate of from ten to sixteen miles an hour; that the horse turned or was turned by the plaintiff to the left and was struck on his hind quarters by the car and the plaintiff thrown out and injured; that the plaintiff drove over the eighty feet intervening between his view of the tracks and the point of collision at the rate of from four to five miles an hour, which was the usual rate of speed of the defendant's cars at this place; that while so driving the plaintiff listened but heard no gong and no noise indicating the approach of a car; that it was shortly after seven o'clock on the evening of November 24, and a light snow was falling with a little rain. *Held*, that there was evidence to go to the jury that the plaintiff was in the exercise of due care; that it might have been more prudent, to drive over the eighty feet where the plaintiff's view to the right was obstructed at the usual rate of speed of the defendant's cars at that point, than to have driven more slowly and thus have given a car which was more than three hundred feet away when the plaintiff saw the tracks more time to get to the crossing, and the court could not say as a matter of law that the plaintiff should have got down from his wagon, gone forward in advance of his horse and looked to see whether a car was coming before driving on to the crossing.

TORT for injuries caused by the plaintiff, who was driving in an open grocery wagon from Richardson Street into Main Street in Wakefield, being run into by an electric car of the defendant running at a high rate of speed southerly along Main Street across the end of Richardson Street. Writ dated March 15, 1898.

At the first trial of this case before *Hardy, J.*, the plaintiff got a verdict, and the defendant's exceptions were sustained by this court in a decision reported in 175 Mass. 331. At the new

trial in the Superior Court, before *Gaskill*, J., the evidence differed in various ways from that presented at the first trial, as explained in the opinion of the court. At the close of the evidence, the jury by direction of the judge returned a verdict for the defendant; and the plaintiff alleged exceptions.

At the time of the former decision reported in 175 Mass. the justices were misled as to the directions of the streets by the plan then before them, which had no points of the compass marked upon it. The following is a reduced copy of the correct plan which was used at the argument of the present exceptions



and is referred to in the opinion. The flagman's house mentioned in the opinion is on the westerly side of the tracks of the Boston and Maine Railroad where they cross Richardson Street and is marked on the plan "Crossing Tender House." The armory and the trees are also marked on the plan. Most of the trees were pines.

J. B. Moran, (*A. D. Moran* with him,) for the plaintiff.

S. J. Elder, for the defendant.

LORING, J. The only question argued in this case is whether there was evidence that the plaintiff was in the exercise of due care.

The plaintiff made out the following case: When he got just past the flagman's house, he looked to the north towards the armory and then to the south in the other direction to see whether a car was coming, and saw none. At this point he had a clear view of the track from the corner of Main and Richardson Streets for three hundred to three hundred and fifty feet north towards the armory. Seeing no car coming, he drove on. The flagman's house is eighty feet from the tracks of the defendant's railway, in Main Street. From that point until the forefeet of the plaintiff's horse were at the further rail of the defendant's

track and the plaintiff, sitting on the seat of his wagon, was two to four feet from the nearer rail of the track, the plaintiff's view was so obstructed by trees that he could not see a car coming from the direction of the armory. When the plaintiff got to this last point, he looked back and saw the car ten or twelve feet away coming towards him from the armory at the rate of ten to sixteen miles an hour; the plaintiff's horse turned to the left, or was turned to the left by the plaintiff (that is to say, away from the car), was struck on his hind quarters, and the plaintiff was thrown out and suffered the injuries here complained of. The plaintiff testified that while driving from the flagman's house to the corner of Main and Richardson Streets, he listened, but heard no gong, no buzzing of electricity, no rattle of the car, nor any noise indicating its approach; that the wagon in which he was driving made no noise, and that there was nothing which would prevent his attention being attracted by the noise of a car coming from the direction of the armory. The collision took place about five minutes after seven o'clock on the evening of the 24th day of November. There was a light snow falling together with a little rain, but not enough to interfere with a person who was standing at the flagman's house seeing a car coming from the direction of the armory.

We cannot say that the effect of the trees on Richardson Street, or the trees on Main Street, or a combination of the trees on both streets, was not such as the plaintiff testified to; neither can we say, of our own knowledge, that if the gong was not sounded, the plaintiff, under the conditions existing on the night in question, must have heard the buzzing of the electricity or the rattle of the car, if he had listened. If the plaintiff looked when he was eighty feet away and could not see a car coming from the direction in question until he was personally within two or three feet of the nearer rail of the track, we cannot say, as a matter of law, that he was guilty of contributory negligence in driving on over the intervening eighty feet at the usual rate of speed of the defendant's cars at this point, listening to hear if a car was coming and looking for a car the first moment when it was possible for him to see one. It is difficult for a traveller to know how to act at a crossing such as this

crossing was stated to be in the plaintiff's evidence. If it is true that the plaintiff could not see the defendant's tracks while driving over the eighty intervening feet of Richardson Street, and that the first sight of the tracks that he could obtain after leaving the flagman's house was when his seat on the wagon was only two to four feet from the nearer rail, there is room for thinking that it would be safer to drive at the usual rate of the defendant's cars at this place than at a slower rate; having ascertained that no car was within three hundred or three hundred and fifty feet of the crossing, it may be that it was more prudent for him to drive at the usual speed of the defendant's cars (which was testified to be four to five miles an hour), when he had only eighty feet to go in order to get to the crossing, and from ninety to ninety-five feet to go in order to get clear of it, rather than to have driven at a slower rate and thereby to have given to a car, which was more than three hundred to three hundred and fifty feet away when he was at the flagman's house, more time to get to the crossing by the time he got there. Neither can we say, as a matter of law, that the plaintiff should have got down from his wagon, gone forward in advance of his horse, and looked to see if a car was coming before driving on to the crossing.

On the whole, we are of opinion that it was a question for the jury to decide whether the condition of things at this place was that disclosed by the evidence of the plaintiff, and, if it was, whether the plaintiff exercised due care. See in this connection *Hicks v. New York, New Haven, & Hartford Railroad*, 164 Mass. 424; *Tilton v. Boston & Albany Railroad*, 169 Mass. 253.

The case presented by this bill of exceptions is altogether different from the case considered by us when this action was here before. *Kelly v. Wakefield & Stoneham Street Railway*, 175 Mass. 381. The plan of the premises now presented has the points of the compass on it, and it appears that Main Street runs north and south and Richardson Street east and west. We understood before that a person at the flagman's house was prevented by the trees from seeing a car for two thirds of the distance from the corner of Main and Richardson Streets to the armory going north from the corner, and could see a car for the remaining one third of that distance. It now appears that a car can be seen for two thirds of

the distance from the corner going north to the armory, and cannot be seen for the remaining third of the distance between the corner and the armory. The distance from the corner to the armory is about five hundred and thirty feet. In addition, when the case was heard before there was no evidence that the plaintiff knew the usual rate of speed of the defendant's cars between the armory and the corner, and no evidence that he listened as he drove on for the buzzing of electricity or the rattle of the car, or any other noise indicating the approach of a car, nor as to whether the wagon which he was driving made a noise which would interfere with his hearing the approach of a car. And at this trial there was evidence from which the jury could have found that after leaving the flagman's house the plaintiff could not see a car coming from the armory until he personally was within two feet of the easterly rail of the track, in place of his horse being within two feet of that rail, as was stated to be the case before; in addition, there were some differences in the testimony, which have already sufficiently appeared.

Exceptions sustained.



HENRY S. HOWE, executor, *vs.* GURDON S. HOWE & others.

Essex. March 11, 1901. — October 17, 1901.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

Tax, On collateral legacies. Limitations, Statute of.

St. 1891, c. 425, imposing a tax on collateral legacies and successions, provides in § 4 that all taxes imposed thereby shall be payable by executors, administrators or trustees "at the expiration of two years from the date of their giving bond," and in § 18 provides that "The treasurer of the Commonwealth shall within six months after the same shall be due and payable, bring suit in his own name for the recovery of all taxes remaining unpaid." *Held*, that the provision in regard to the treasurer bringing suit is directory merely, and does not limit the right of recovery to two years and six months after the giving of bonds by executors, administrators or trustees. *Whether* the general statute of limitations would be applicable to a suit brought by the treasurer after six years from the time when the tax was due and payable, was not before the court and was not considered.

Collateral legacies of future and contingent interests are taxable under St. 1891, c. 425. The tax is to be paid when the contingency occurs and the determina-

tion of the value of the future interest is to be postponed until the happening of the event. It is then to be valued as of the time of the testator's death.

In valuing future and contingent interests for taxation as collateral legacies under St. 1891, c. 425, when the contingency has happened, a preceding life interest to be deducted must be valued as of the time of the death of the testator and is to be determined by the actuaries' combined experience tables and four per cent compound interest, as required by the last sentence of § 18 of the act, without regard to the actual length of life in the particular case.

St. 1895, c. 307, exempting from the tax on collateral legacies bequests not exceeding \$500, does not apply to legacies to which persons became entitled before it took effect.

A testator directed his trustees to pay to his sister quarter yearly during her life such sums as with the rents and income of her own property would give her a net annual income of \$10,000, and left remainders which were subject to taxation as collateral legacies under St. 1891, c. 425. The net annual income of the testator's sister from her own property at the time of the testator's death was \$1,453.20, leaving \$8,546.80 to be paid to her by the executors and trustees. For the purpose of deducting the sister's life interest in valuing the collateral legacies, the Probate Court ruled, that she was to be regarded as entitled to an annuity of \$8,546.80 during her life. The treasurer of the Commonwealth objected that the amount that was to be paid to her was not an annuity or life estate that could be appraised by the combined experience tables, as required by § 18 of the act, because it was of uncertain amount and might fluctuate from year to year. *Held*, that for aught that appeared the net income from the sister's own property had remained and would remain substantially the same from year to year and, if that was so, the annuity fairly might be said to be \$8,546.80 during her life, or, as the intention of the testator manifestly was that his sister should receive a net income of \$10,000 during her life, the annuity might be regarded as one of \$10,000 a year, subject to reduction by the amount of the net income if any received from her own property, so that in computing the value of her interest the annuity properly might be reckoned as one of \$10,000 a year, and that in any case the treasurer had no ground for complaint.

MORTON, J. This is a petition to the Probate Court under St. 1891, c. 425, § 14, by the executor of the will of James H. Carleton late of Haverhill for the determination of certain questions arising under said will in regard to legacy and succession taxes. The petitioner and the treasurer of the Commonwealth both appealed from the decree of the Probate Court. The appeals were consolidated by order of the single justice, and at the request of the parties were reserved by him, "for the consideration of the full court upon the petition and answers and the facts set out in the decree, such order and decree to be made as to the full court shall seem meet."

The testator died in March, 1893. The will was duly proved and executors were appointed and gave bonds in May of the same year. Subsequently the petitioner's coexecutor resigned,

and the petitioner has since acted and is now acting as the sole executor. By the residuary clause the rest and residue was given in trust for certain purposes, and trustees were duly appointed under this clause and gave bonds in May, 1895. This petition was filed in July, 1898, and, prior to the filing of it, no suit had been brought by the treasurer of the Commonwealth for the recovery of any legacy or succession tax. The testator's estate exceeded \$10,000 in value after the payment of all debts, and by his will a large part of it went to persons not within the classes exempted by the provisions of St. 1891, c. 425, § 1, from the payment of a collateral inheritance tax.

The first question is whether, if the estate was subject to any tax, the right to collect it has been lost by the failure of the treasurer to bring suit therefor within two years and six months after the executors and trustees gave bonds. The Probate Court ruled that it had not, and we think that the ruling was right.

The petitioner contends that the effect of so much of § 4 as provides that all taxes shall be due and payable at the expiration of two years, and of so much of § 18 as provides that the treasurer shall bring suit within six months after the taxes are due and payable, is to establish two years and six months from the giving of bonds by the executors, administrators and trustees as a limit to the right of recovery. But we think that the provision in regard to the treasurer is directory merely, and that if it had been intended to limit the right of recovery to two years and six months after the giving of bonds by executors, administrators or trustees, language clearly expressing that purpose would have been used, as in the cases of the statute limiting actions against executors and administrators, and of the general statute of limitations. Pub. Sts. c. 136, § 9; c. 197, § 1. The statute provides, that administrators, executors and trustees shall be liable for the taxes with interest till paid, and that the taxes shall be a lien on the property subject to them till they are paid. §§ 1, 4. There are also provisions that no specific legacy subject to the tax shall be delivered by the executor until he has collected the tax (§ 5), that when legacies chargeable upon real estate are subject to a tax, it shall be a charge upon the real estate until paid (§ 6), and that no final settlement of the account of an

executor, administrator or trustee shall be allowed till all taxes have been paid (§ 16). The plain import of all these provisions is that nothing except payment or a satisfaction of the tax in some form shall operate as a discharge of it or prevent its collection. The petitioner objects that according to this construction, the treasurer can bring suit at any time and that the lien will continue indefinitely. But, even if that were so, the Legislature having imposed the tax well may have deemed it proper that nothing except payment should discharge it and that the remedies provided for its collection should remain open until it was paid. Under St. 1823, c. 133, where no limit was fixed to the lien which was given, it was held in *Hayden v. Foster*, 13 Pick. 492, that the lien continued till the tax was paid. The question whether the general statute of limitations would be applicable to a suit brought by the treasurer after six years from the time when the tax was due and payable is not before us and need not be considered. See *Rich v. Tuckerman*, 121 Mass. 222.

The petitioner further contends that no tax can be levied in respect of the appointees of the household furniture and effects, or in respect of the final disposition of the fund of \$40,000. The household furniture and effects were bequeathed to the testator's sister Mary C. Flint for life with directions that upon her death the same should be distributed as she and one Susie B. Sanders should appoint. The life estate of Mrs. Flint was not taxable, and it was not ascertained till more than two years and six months after the executors and trustees had given bonds who the appointees were or whether they were exempt. We infer, though it is nowhere distinctly stated in the record, that none of them come within the exempted classes. The \$40,000 was given to the petitioner in trust to pay the income to Gurdon S. Howe till he arrived at the age of forty-five and then to pay over the principal to him. If he died before reaching that age then the principal was to go to such heirs of his body as should be living when he would have reached the age of forty-five, and in default of such heirs then to his widow for life with remainder to two institutions exempt from taxation. It is admitted that the interest of Gurdon S. Howe until he attains the age of forty-five years is subject to the tax.

The contention of the petitioner in respect to these matters is that it was not ascertained till after the expiration of the time when taxes provided for by the statute are due and payable who the appointees of the furniture and effects were, and that until Gurdon S. Howe arrives at the age of forty-five years or dies it is uncertain and contingent in whom the fund of \$40,000 will vest, and therefore in neither case is any tax collectible. There is no provision in the statute relating specifically to interests that vest after the death of a testator, and before the expiration of two years or two years and six months from the giving of bonds by executors, administrators and trustees, and the contention of the petitioner is in substance and effect that only those interests which vest at the death of the testator are taxable, and that future and contingent interests are not taxable. The treasurer of the Commonwealth objects that the life interest of Mrs. Flint should be determined according to the time that she actually lived and not according to the "actuaries' combined experience tables and four per cent compound interest" as provided in the concluding sentence of § 13.

The Probate Court ruled that the future interest in the household furniture and effects was subject to a tax and that the valuation was to be ascertained by deducting the value of the life interest of Mrs. Flint reckoned according to the combined experience tables with compound interest at four per cent, as if the same had been appraised within three months after the testator's death while she was living. In regard to the fund of \$40,000 it ruled that any interest to which the two institutions may become entitled was exempt, but that any interest to which Gurdon S. Howe will become entitled if he attains the age of forty-five, or to which the heirs of his body or his widow may become entitled if he dies before arriving at that age are subject to the tax and that such tax shall be paid by the executor when the time arrives and that the determination of the value of such future interest be postponed until the happening of said event.

We think that these rulings were right. The obvious intent of the Legislature was to tax every interest, present or future, passing by will to persons or institutions other than those

expressly exempted, when the value of the estate after the payment of debts exceeded \$10,000. By § 1 "All property within the jurisdiction of the Commonwealth, and any interest therein . . . whether tangible or intangible" is included, and by § 17 "the word 'property' shall include both real and personal estate, and any forms of interest therein whatsoever, including annuities." In the present case it is clear that notwithstanding the appointment by Mrs. Flint and Mrs. Sanders the future interest in the furniture and effects passed by the will of James H. Carleton. *Emmons v. Shaw*, 171 Mass. 410. The statute no doubt contemplates that the taxes shall be paid at the expiration of two years after the executors have given bonds, and that generally speaking all questions in regard to them will be settled within the time usually allowed for settling estates. *Callahan v. Woodbridge*, 171 Mass. 595, 599. *Minot v. Winthrop*, 162 Mass. 113, 125. But provision is made for other cases in the concluding words of § 18, "that the probate court may extend the time when any tax shall be due and payable whenever the circumstances of the case may require," and as such cases arise the other provisions of the statute apply to them. In ascertaining, for instance, when the time arrives, the valuation of a future interest, the value of a preceding life estate will be determined according to the rule laid down in the concluding sentence of § 13, and not according to the actual length of life in the particular case. And the time as of which according to the scheme of the statute, the valuation of the property liable to taxation is to be made, is the death of the testator (*Hooper v. Bradford*, 178 Mass. 95), and not as it might have been the time of the actual vesting of title or of possession in the party liable to the tax, and whenever the valuation takes place it is to be ascertained as of that date. This is an arbitrary rule, but it is the rule established, we think, by the statute. The "actual value" spoken of in § 13 has reference to that date and both it and "the actual market" value are to be arrived at, when a life estate is one of the factors, by determining the value of the life estate in the manner provided in § 13. Perhaps this construction may result in an inequality between a life estate where the remainder vests at the death of the testator, and one where it is to vest upon the

happening of some uncertain event in the future. But, if so, the result is due to the manner in which the statute is drawn, and does not of itself furnish a sufficient reason for construing the statute, if that were possible, so as to exclude future contingent interests. *Minot v. Winthrop*, 162 Mass. 113, 125.

There were several pecuniary legacies each of \$500 and less to persons not exempt from taxation. The petitioner contends that under St. 1895, c. 307, § 1, which took effect April 25, 1895, these are exempt. That statute provides that "No bequest of a testator whose estate is subject to taxation under the provisions of chapter four hundred and twenty-five of the acts of the year eighteen hundred and ninety-one shall be subject to the provisions of said chapter unless the value of such bequest exceeds the sum of five hundred dollars." The Probate Court ruled that the legacies were not exempt, and we are of opinion that the ruling was right. The general rule is that statutes are to be construed as prospective in their operation unless it is distinctly expressed or clearly implied that they are to have a retroactive effect. *Garfield v. Bemis*, 2 Allen, 445. We see nothing to take this statute out of the general rule and think that it does not apply to legacies to which parties became entitled before it took effect.

In addition to a life estate in the household furniture and effects the testator gave his sister a life estate in his dwelling house with successive life estates upon her death to Susie B. Sanders and Gurdon S. Howe, and upon the termination of the life estates or if the property should not be occupied by the life tenants then the premises were to be sold and the proceeds distributed share and share alike to the said Susie B. Sanders, Henry S. Howe and Gurdon S. Howe respectively and their heirs, one third to the heirs of each. Mrs. Flint occupied the premises during her life, but Mrs. Sanders and Gurdon S. Howe elected not to occupy them. None of the parties were or are exempt from taxation except Mrs. Flint. The Probate Court ruled that the executor and the testator's personal estate were liable for a tax upon the value of the interest in the homestead estate disposed of by the testator after his sister's death, such value to be ascertained by deducting from the value of the homestead at his death the value of the sister's life interest

reckoned according to the combined experience tables with four per cent compound interest and as if the same had been appraised within three months after the testator's death. The treasurer of the Commonwealth objects that the value of the estate actually enjoyed by Mrs. Flint should be deducted and the tax assessed upon the interests in remainder which thus actually passed to Susie B. Sanders, Henry S. Howe and Gurdon S. Howe or their respective heirs, and he bases his contention upon the impossibility of determining during Mrs. Flint's life the value of the interests that would pass to Mrs. Sanders and Henry S. and Gurdon S. Howe or their respective heirs. But the life estates have all been determined, and the time has arrived when the value of the remainder can be ascertained, and for reasons already given we think that the ruling of the Probate Court as to the manner in which and the time as of which it should be ascertained was correct.

The testator also directed his executors and trustees to pay over to his sister quarter yearly during her life out of the rest and residue which was given to them in trust for that and other purposes such sums as with the rents and income of her own property would give her a net annual income of \$10,000. The net annual income from her own property at the time of the testator's death was \$1,458.20, leaving \$8,546.80 to be paid to her by the executors and trustees to make up an income of \$10,000. Upon the death of the sister the executors and trustees were directed to pay certain bequests and make certain conveyances and dispositions to and in favor of certain persons and institutions some of whom were liable to a collateral inheritance tax, and one of the questions presented relates to the value of the interest of Mrs. Flint in the rest and residue. The Probate Court in effect ruled that she was to be regarded as entitled to an annuity of \$8,546.80 during her life and that the value of her interest was to be computed according to the actuaries' combined experience tables with four per cent compound interest and as if the same had been appraised and determined within three months after the testator's death. The treasurer for the Commonwealth objects that the amount that was to be paid to her was not an annuity or a life estate that could be appraised by the combined experience tables because it was of

an uncertain amount and was liable to fluctuate from year to year. If the amount was liable to fluctuate there is nothing to show how great or how small the fluctuation was likely to be, and for aught that appears the net income from her own property had remained and would remain substantially the same from year to year. If that was so we do not see why it fairly could not be said that the annuity was \$8,546.80 a year, and why her interest in the rest and residue should not be valued accordingly, which was what the Probate Court did. See *Woods v. Gilson*, 178 Mass. 511; *Brimblecom v. Haven*, 12 Cush. 511; *Swett v. Boston*, 18 Pick. 123. There is another view. The intention of the testator manifestly was that his sister should receive a net income of \$10,000 a year during her life. The annuity may be regarded therefore as an annuity of \$10,000 a year subject to reduction by the amount of the net income, if any, received by Mrs. Flint from her own property, so that in computing the value of her interest in the rest and residue the annuity properly might be reckoned as an annuity of \$10,000 a year. See *Cumings v. Cumings*, 146 Mass. 501; *Peareth v. Marriott*, 22 Ch. D. 182. But, if the property is subject to taxation at all, the petitioner does not object to the valuation of Mrs. Flint's interest in the rest and residue as ascertained by the Probate Court, and the treasurer of the Commonwealth cannot complain if the view suggested above is not adopted.

We have considered the objections taken by the petitioner and by the treasurer of the Commonwealth to the decree of the Probate Court so far as they have been insisted upon at the argument before us, and the result is that we think that the decree of the Probate Court should be affirmed.

So ordered.

J. L. Thorndike, for the petitioner.

A. W. De Goosh, Assistant Attorney General, for the treasurer of the Commonwealth.

JASPER W. STONE & others, trustees, & others, vs. JOSEPH STONE, trustee, & others.

Middlesex. March 14, 15, 1901. — October 17, 1901.

Present: HOLMES, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Evidence, Admission. Deed, Construction.

One who claimed under a deed of release, wishing to show that it conveyed a certain lot of land belonging to the grantor which was not expressly described in it, testified as follows: "I showed him [the grantor] that release, and asked him what it meant, and he said, 'I don't know.' I said, 'That is your signature.' He said, 'Yes,' and I said, 'You made it out,' and he said, 'Yes, I made it out,' and then said, 'I don't remember about it.'" It appeared that at this time the grantor seemed to be failing and his memory to be very poor. *Held*, that the evidence did not warrant a finding of a master, that when the deed was shown to the grantor "he did not attempt to repudiate it or deny that it applied to the property" which was the subject of the suit, as there was nothing in the evidence which showed that the question, whether the release applied to the land in dispute, was ever presented to the mind of the grantor.

In the case of *Gerrish v. Gary*, 120 Mass. 132, the true boundary on the southeast of the "Penny Ferry lot" in Charlestown, mentioned therein and in this case, was not in issue, and for that reason it may be doubted whether the statement by the court in *Gerrish v. Gary* as to that boundary line is decisive of the rights of the parties to that suit; but, however that may be, neither Amos nor Phineas Stone, whose rights were involved in the present case, was a party to *Gerrish v. Gary* or concluded by the decision therein, if it can be taken as concluding anybody as to the southeasterly boundary line of the "Penny Ferry lot."

In 1860 and thereafter two brothers P. and A. held each one undivided quarter of certain land. J. the son of P. acquired a mortgage on this land. In 1891 P. died leaving his interest to J. Four years later J. produced an unrecorded release from A. to P. dated February 1, 1880, by which he contended that A. had conveyed to P. all his interest in the land. J. recorded this release in 1895, and entered to foreclose his mortgage. In 1896 A. died, and thereafter his heirs brought a bill against J. to redeem from the mortgage. J. set up the release of February 1, 1880, in defence to the bill. The release, after referring to a deed of other land not material, referred to a certain deed from one G. to A., the grantor, dated December 19, 1854, and continued as follows: "Now therefore the said P. did verbally agree to and with A. now of said Everett that if he the said A. would pay one half of the purchase money with all other incidental expenses connected with said parcels, and pay one half the costs of all improvements connected with or on said parcels he would convey to him an undivided half part of his interest in the same, I, the said A., having failed in every particular to perform my part of the conditions to be done and performed by me to entitle me to the same do hereby absolutely release all my right, title and interest in and to said parcels of real estate that I may have acquired in any way whatever, and I do hereby remise, release and quitclaim unto the said P.

and his heirs and assigns and do absolve him from all obligations under his promise." There was a deed from G. to A. dated December 19, 1854, but it did not convey the land in question. The mortgaged land was conveyed by another deed from G. to A. dated June 1, 1854, and was not named in the release. It appeared, that the recitals in the release were not in accordance with the facts; also, that after the date of the release no change was made in the treatment of the property and that after that date as before A. was treated as the owner of a one quarter interest in the land, for eleven years during which P. lived, and for four years after P.'s death during which P.'s clerk was living, and that in 1891 J. in a letter to certain park commissioners offered to sell the land, stating that he was duly authorized by the owners, P. one quarter interest, A. one quarter interest, and two others mentioned. *Held*, that the release of February 1, 1880, if it ever took effect at all, applied to the land conveyed to A. by the deed of December 19, 1854, and not to the land sought to be redeemed from the mortgage, which was conveyed to him by the deed of June 1, 1854.

BILL IN EQUITY to redeem from a mortgage certain land partly in that part of Boston called Charlestown and partly in Everett, filed in the Supreme Judicial Court July 13, 1898.

The case was heard by *Hammond, J.*, upon a master's report and exceptions thereto. The justice after stating his rulings upon the exceptions to the master's report made the following memorandum of decision :

"I find that the deed from the city of Charlestown to John Gary, dated December 19, 1854, was given for the purpose of releasing certain land and flats which formerly belonged, or were supposed to belong, to the Penny Ferry, and which were not included in the first deed; and the description was broad enough to cover such land, whether situated in Charlestown or in Malden (now Everett), or partly in each, and was intended to cover such land, whether it was wholly in either Charlestown or Malden (now Everett), or partly in each. And I further find that at the time of the delivery of this second deed to Gary, and in all the subsequent conveyances, all parties supposed that there was such land situated a part in Charlestown and a part in Malden (now Everett), and had reason thus to suppose.

"I do not find, therefore, in the release of February 1, 1880, any conflict between the description of the second parcel and the reference to the deed of December 29, 1854; and I rule that the release does not relate to the land named in the first deed to Gary.

"I find that Amos Stone, at the time of his death, was the owner of one quarter of the land in controversy, subject to the

mortgage held by the defendant Joseph Stone, and that his representatives are entitled to redeem. They must pay the whole sum due upon the mortgage if the defendant insists, for they cannot compel him nor the other owners to join in the redemption. There is to be a decree accordingly for the plaintiffs."

A decree was entered for the plaintiffs; and the defendants appealed. The material portions of the findings of the master and of the evidence reported by him are stated in the opinion of the court.

T. Hunt, (F. M. Forbush with him,) for the defendants.

A. F. Means, (G. R. Blinn with him,) for the plaintiffs.

LORING, J. This is a bill in equity to redeem from a mortgage certain land lying partly in the Charlestown District of the city of Boston and partly in Everett. The land was bought in 1854 from the city of Charlestown by Phineas and Amos Stone and three other persons named Gary, Howland, and Sewall. The interests of the several purchasers were originally — Gary, one quarter; Howland, one quarter; Sewall, Phineas and Amos Stone, one sixth each. In 1860, Howland sold his one quarter interest to Phineas and Amos Stone and Sewall, and thereafter each of the remaining purchasers, namely, Gary, Sewall, and the two Stones, had each of them one undivided quarter interest in the land.

The land was originally paid for by a mortgage back to the city of Charlestown for the whole purchase money, one half of which was due in five years and the other in ten years. The half due in five years was paid at maturity, in June, 1859; the other half, amounting to \$11,919.75, is still unpaid. In June, 1891, the defendant, Joseph Stone, became the purchaser and assignee of this mortgage.

Phineas and Amos Stone were brothers. Phineas died in August, 1891, leaving the defendant Joseph Stone, his oldest son, his residuary legatee and devisee. About four years after his father's death, Joseph produced a release from Amos to Phineas Stone, dated February 1, 1880, which he said he had just found among his father's papers, and claimed that by it Amos had conveyed to Phineas all his interest in the land in question. The release was throughout in the handwriting of Amos Stone, and had never been recorded. Acting on this

claim, Joseph recorded the release on May 31, 1895, and on July 13, 1895, entered to foreclose the mortgage assigned to him in June, 1891; he now refuses to allow the heirs of Amos to redeem. Amos died in February, 1896, seven months after Joseph entered to foreclose. This bill is brought to assert the rights of Amos' heirs in the premises.

One Abby M. Andrews, who was the clerk of Phineas during his lifetime, was coexecutor with Joseph under Phineas' will. She told Joseph that Amos owned one quarter of the property in question, and in the inventory of the estate of Phineas Stone it was stated that he owned one quarter of this property and not one half of it. Abby Andrews died two months before the release dated February 1, 1880, was recorded. Joseph was unable to testify definitely as to the time when he found this release, but it was shortly before it was recorded.

It appears that no change was made in the division of the net income of the property after the date of the release of February 1, 1880, but that after that date, as before it, one quarter of the net income was paid to Amos; and this continued for the eleven years after the date of the release during which Phineas was alive and during the four additional years after his death until his clerk, Abby M. Andrews, died, making fifteen years in all. Joseph's story is that he found the release among some papers in an ordinary docket box on his desk; that the box and the papers had been there since they were taken out of the safe where they were kept by Phineas, and handed to him by Miss Andrews in 1891, and that he had examined these papers several times before he found out what the purport of this release was.

When this estate was purchased from the city of Charlestown, the title to it was taken in the name of Gary. At that time, all the purchasers except Gary were members of the city government of Charlestown, and the defendant in his brief admits that "possibly" this was the reason for none of the purchasers except Gary appearing as grantees. Gary held the title for one year, namely, until June, 1855, when he conveyed to Howland the legal title to his (Howland's) one quarter interest; and one year later, namely, in May, 1856, he conveyed to Phineas Stone the legal title to the one undivided half of the estate bought by

Sewall, Amos Stone, and himself. Two months later, namely, in July, 1856, Phineas conveyed to Sewall his one third of the one half which had been conveyed to him, Phineas, by Gary.

When Howland sold his one quarter interest to Sewall and the two Stones, in 1860, he conveyed the legal title to it to Amos Stone. Three years later, in October, 1863, Amos conveyed one third of this one quarter to Sewall and one third to Phineas.

These are the only deeds on record, and the defendant now claims, not only that Amos conveyed to Phineas all his interest by the unrecorded release dated February 1, 1880, but also that all the interest Amos had at that time to convey was an undivided one twelfth interest, namely, the interest which was left in him, Amos, under the conveyance to him by Howland of Howland's one quarter interest after Amos had conveyed away one third of that one quarter to Phineas and the same interest to Sewall.

The master found that Amos had one quarter interest before he executed the release of February 1, 1880, and ruled that that interest passed to Phineas by virtue of that release. The presiding justice affirmed this finding as to the one quarter interest, but ruled that the release did not apply to the land in question at all, and entered a decree allowing the plaintiffs to redeem.

The finding that Amos, after 1860 and prior to February, 1880, had one quarter interest was right.

In the deed from Amos to Phineas by which Amos conveyed to him his (Phineas') one twelfth interest which Phineas bought of Howland, the legal title to which had been conveyed to Amos by Howland at the time of the purchase three years before, it is stated that Amos conveys "one undivided third part of the several parcels of land flats and rights pertaining thereto, situate," etc. (describing the land in question, among other parcels); the deed then continues as follows: "meaning and intending hereby to convey to said Phineas J. Stone so much of said parcels and rights that was conveyed to me by said Howland as aforesaid, as will make him the said Phineas J. Stone together with what was conveyed to him by John Gary by deed dated May 1, 1856 recorded as above Book 751, Page 274, the owner of one undivided fourth part of the several parcels of land, flats and rights

that were conveyed to said John Gary by the City of Charlestown," by two different deeds, which are there mentioned. The reason for there being two deeds from the city of Charlestown to Gary will be explained later on. There was a similar clause in the deed by which Amos Stone, on the same day, conveyed to Sewall his third of the one quarter which had been conveyed by Howland to Amos Stone. This deed from Amos to Phineas is a statement by Amos, acquiesced in by Phineas (by accepting, and holding under, the deed), that the interest of Phineas in the land at that time was such, that if one third of one quarter, namely, one twelfth, were added to it, he would have one quarter; that is to say, it was a statement that Phineas then had one sixth. If Phineas, between May, 1856, when he got the legal title to the one undivided half owned by himself, Sewall, and Amos in equal shares, and the date of this deed from Amos to Phineas, namely, October, 1863, had conveyed to Amos his one third of that one half, Phineas would have had at the date of the deed from Amos to him one sixth, as it is indirectly stated in that deed he then had. And we are of opinion that, on all the evidence in this case, it must be found that such a deed was made by Phineas to Amos, and was subsequently lost.

If such a deed had been made, it is not improbable that Amos would not have recorded it. It is evident that these purchasers arranged the subsequent conveyances between themselves so that the fact, which they concealed at the outset, would remain hidden, namely, the fact that they, while members of the city government of Charlestown, had sold this tract of land to themselves and Gary. It is evident that it was for this reason that Gary held the whole legal title for a year and then conveyed one quarter to Howland; and that it was not until a year after that, that is to say, two years after the purchase was made, that Gary conveyed one half to Phineas; and not until two months after Phineas got this one half, that he conveyed one sixth to Sewall; and again, when in October, 1860, six years after the original purchase, Howland sold his one quarter to Phineas, Amos, and Sewall, it was evidently for this reason that a conveyance of the whole one quarter was made to Amos, and that it was not until three years after that, namely, in October, 1863, that Amos dared to convey to Phineas and Sewall their shares of this one

quarter. If the original verbal agreement under which the purchase was made was carried into effect, Amos had from Phineas a deed of one third of the one half conveyed to him by Gary ; and, as we have said, if such a conveyance was made, it was not improbable, for the reasons we have stated, that it was not recorded.

In addition to this, it appears that for thirty-five years, namely, from 1860 to 1895, Amos received one quarter of the net income of the estate, and in the settlements of the income which were made was recognized by all interested, time and again, as owning one quarter of the property. One piece of evidence in this connection is of sufficient importance to be singled out and stated at length : In February, 1891, six months before Phineas died, this very defendant, Joseph Stone, wrote a letter to the park commissioners of the city of Boston, in which he said that he was "duly authorized by the owners, Phineas J. Stone, one-quarter interest ; Amos Stone, one-quarter interest ; heirs of Moses B. Sewall, five in number, one-quarter interest ; heirs of John Gary, five in number, one-quarter interest," to offer a portion of this land for sale to them, and did offer to sell it to them on terms therein stated. And finally, it was not until four years after Phineas died and two months after the death of Phineas' clerk, that the claim was made that Amos did not own one quarter. In view of all these facts, we are of opinion that the statement in the deed from Amos to Phineas, dated October 6, 1863, that Phineas had one sixth interest prior to the date of that deed, must be taken to be correct, and that such a deed from Phineas to Amos was made, and subsequently lost.

The defendant relies in this connection on the finding of the master that "Joseph showed this deed [of February 1, 1880] to Amos, who did not attempt to repudiate it or deny that it applied to the property which is the subject of this suit." The defendant, Joseph Stone, testified that within a short time after he found the release of February 1, 1880, "I showed him that release, and asked him what it meant, and he said, 'I don't know.' I said, 'That is your signature.' He said, 'Yes,' and I said, 'You made it out,' and he said, 'Yes, I made it out,' and then said, 'I don't remember about it.'" Later this defendant testified that this was in May, 1895. Amos died in February, 1896.

The contention founded on this finding of the master is answered by the testimony of this same defendant that "For several years before his death he [Amos] seemed to be failing. His memory seemed to be very poor. Many things to which I called his attention he could not tell anything about. It got so bad finally that the trustees of the bank had to elect a new president." There is nothing in the evidence which shows that the question whether the release of February 1, 1880, did or did not apply to the property, which is the subject of this suit, was ever presented to Amos' mind, and the master's finding that he never denied that it did apply to it is not warranted by the evidence; he always claimed that he owned one quarter. If he did own one quarter in 1895, the release of February 1, 1880, either did not apply to the locus or it never took effect at all.

The defendant also relies in this connection upon the release dated February 1, 1880; he relies on that release, not only as a conveyance of Amos' one quarter interest, but also as a statement that Amos never became entitled to any part of the one half conveyed to Phineas by Gary, and for that reason that it cannot be found as a fact that a deed for one sixth interest was made and has been lost; and he contends that this should control the facts which we have referred to.

This contention cannot be disposed of without a full consideration of the release dated February 1, 1880, and we shall now consider that release with respect to both aspects of it, which we have just stated.

The release recites that whereas P. J. Stone "is possessed of a certain parcel of real estate situate on Medford Street," in the Charlestown District of the city of Boston, describing it, and "also one other parcel of land situate partly in the town of Everett, in the County of Middlesex and Commonwealth aforesaid, and partly in said Charlestown District, conveyed to him [Phineas J. Stone] by John Gary of said Charlestown District, being an undivided half part of the estate conveyed to said Gary by the City of Charlestown by deed dated December 19, 1854, recorded in Middlesex Registry, So. District, Book 701 Page 12. Now therefore the said P. J. Stone did verbally agree to and with Amos Stone, now of said Everett that if he the said Amos Stone would pay one-half of the purchase money

with all other incidental expenses connected with said parcels, and pay one half the costs of all improvements connected with or on said parcels he would [sic] convey to him an undivided half part of his interest in the same, I, the said Amos Stone, having failed in every particular to perform my part of the conditions to be done and performed by me to entitle me to the same do hereby absolutely release all my right, title and interest in and to said parcels of real estate that I may have acquired in any way whatever, and I do hereby remise, release and quitclaim unto the said P. J. Stone and his heirs and assigns and do absolve him from all obligations under his promise."

The defendant contends that the verbal promise referred to in this release was the promise to hold for Amos one third of the one half conveyed to Phineas by Gary, and that this is a statement by Amos that he had failed to pay his share of the original purchase money and of the subsequent improvements made on the premises, and, as has been said, that the deed operated, not only to release Phineas from his verbal promise as to the one third of the one half, but also to convey to him (Phineas) the one twelfth left in Amos under the deed of one quarter to him from Howland after he had conveyed one third of that one quarter to Phineas and a like interest to Sewall.

"The estate conveyed to said Gary by the City of Charlestown by deed dated December 19 1854 recorded in Middlesex Registry, So. District, Book 701 Page 12," mentioned in the release of February 1, 1880, was not the land which the plaintiffs seek to redeem in this bill. The land which the plaintiffs seek to redeem is that described in the deed from the city of Charlestown to Gary, dated June 1, 1854, and acknowledged June 26, 1854, being the same premises described in the mortgage of the same date from Gary to Charlestown to secure his two notes of \$11,919.75 each. The land conveyed by the city of Charlestown by the deed dated December 19, 1854, was in addition to that conveyed by the deed of June 1, 1854. The land conveyed by the deed of June 1, 1854, consisted of five parcels on the westerly side of Malden Bridge on the northerly bank of the Mystic River, and were situate in part in Everett and in part in the Charlestown District of Boston; and of one parcel lying on the east side of Malden Bridge. According to the plan

annexed to the master's report and marked "Tracing of Plan by Thomas Doane," the five parcels on the west of the bridge contained in all between fifty-five and fifty-six acres and the parcel on the east of the bridge contained one and one fourth acres. The land on the east of the bridge is marked on that plan, "Old Penny Ferry Way," and by the description of that lot given in the deed, it is bounded on the southeast by a line therein described, which was then the boundary line between Charlestown and Malden, and is now the boundary line between Boston and Everett; the other boundaries of the "Old Penny Ferry Way" shown on said plan are on the southwest the line of low water and on the northwest by the bridge. This is the same "Penny Ferry Way" that was before this court in *Gerrish v. Gary*, 120 Mass. 182. That case and all the papers in it were put in evidence in this case, and are now before us.

The additional conveyance from the city of Charlestown to Gary made by deed dated December 19, 1854, came about in the following way: On August 8, 1853, Gary made a petition to the city of Charlestown, in which he stated that he was "desirous of purchasing of the city, all that part of the Alms House Estate, lying on the east side of the road, also, the flats upon the west side of the road, or such part of the same as the City Council may be disposed to sell." The land originally conveyed to Gary by the deed of June 1, 1854, was part of the almshouse estate of the city of Charlestown. In pursuance of that petition, the city of Charlestown, by deed of December 19, 1854, recorded Book 701, Page 12, being the deed referred to in the release of February 1, 1880, conveyed to Gary for a nominal consideration "all the right title and interest which said City has in and to the land and flats which formerly belonged to the Penny Ferry which lie easterly of and adjoining to Malden Bridge and the streets and abutments leading thereto and southerly of the following described line, [then follows a description of the southeasterly boundary line of the Penny Ferry lot as conveyed by the deed of June 1, 1854] meaning and intending to quitclaim to said Gary all the land and flats if any there be, which formerly belonged to said Penny Ferry situated southerly of said line above described and easterly of said Bridge and the said

A portion of the plan referred to as "Tracing of Plan by Thomas Doane" reduced.

The map shows the Charles River flowing from the top right towards the bottom left. Key features include:

- Perkins' Flats and Perkins' Marsh on the right bank.
- The City of Boston and the Harbor of Boston on the left bank.
- The Old Penny Ferry Way crossing the river.
- The City of Boston.

The map is labeled with "TOWN" and "CITY" and includes a scale bar.

abutments and streets which is not included in said deed from said City of Charlestown to said Gary."

A consideration of what the Penny Ferry consisted of makes the purpose of this deed plain.

In 1640, Charlestown "established, and for more than a century afterwards maintained, a ferry at this place, known as Penny Ferry. In 1648 the town ordered 'the ways to be made passable for people to go to the boats at the low water mark,' and that there should be a causeway made at the ferry." *Gerrish v. Gary*, 120 Mass. 132, 133. J. F. Fuller testified, in *Gerrish v. Gary*, that in 1858, he assisted his father, S. P. Fuller, in making a survey of the premises; that the old causeway of the Penny Ferry was then visible, and that it extended one hundred and one feet below low water mark. This is shown on Plan C, admitted in evidence in this case as the plan made by S. P. and J. F. Fuller, referred to in *Gerrish v. Gary*. It may be assumed that this extension of the Penny Ferry causeway below low water mark was made in pursuance of the order made by the town in 1648, directing "the ways to be made passable for people to go to the boats at the low-water mark," and that the extension was used for landing passengers at low tide by bringing the ferry-boat alongside this extension of the causeway when the tide was out. The maintenance of this causeway, even below low water mark, gave to the owner a prescriptive title, at least to the causeway, even as against the Commonwealth. *Nichols v. Boston*, 98 Mass. 39. It was not until 1867 that the present statutory provision prohibiting the obtaining of a prescriptive title against the Commonwealth to flats below low water line was enacted. St. 1867, c. 275. Pub. Sts. c. 196, § 11. It is evident that one of the purposes of this conveyance was to convey to Gary the title of the city to the flats covered by the causeway below low water mark. This conveyance was followed by a grant from the Legislature to build a wharf over ninety-six of these one hundred and one feet; St. 1856, c. 111; and it appears that in the years 1857 and 1858 a pile wharf was built on these flats, by the five purchasers, extending ninety-six feet beyond the end of the Penny Ferry lot mentioned in the deed of June 1, 1854. These flats were north of the boundary line between Charlestown and Malden, were wholly in Charlestown, and passed to Gary under the deed of December 19, 1854.

Whether the grantee of that deed took any right, title or interest to flats in what was then Malden and is now Everett, that is to say, to flats on the southeasterly side of the southeasterly boundary line of the Penny Ferry lot, as described in the deed of June 1, 1854, is not so clear. But the defendant Stone and the others now holding the title conveyed to Gary by the deed of December 19, 1854, claim that the title to flats lying southeasterly of that southeasterly boundary line did pass; and further, they claim that they now own the same. The origin of the title to these flats was stated by the defendant Joseph Stone at a view of the premises taken by the master; he stated that he and his associates "claimed titles, rights, or easements in the land or flats on the easterly side of the parcel colored green, [the Penny Ferry Way lot is colored green on Doane's plan,] claiming that these titles, rights, or easements had been acquired through adverse possession by the owners of locus using the flats at the ends and sides of the wharf (which covered parcel colored green) [*sic*], to lay vessels for the purpose of loading and unloading them."

The claim to ownership of these flats now made by the defendant Stone and his associates was made when the Metropolitan Sewerage Commission took about half an acre of them, lying in the town of Everett on the southeasterly side of the boundary line between Boston and Everett. On this land being taken, the defendant, Joseph Stone, claiming to own one undivided half interest therein, and the heirs of Gary and Sewall, claiming to own one quarter interest each, brought a petition stating that the flats were owned by them in fee, and asking to have their damages assessed and paid. The defendant, Joseph Stone, claims that the decision in *Gerrish v. Gary* is fatal to the theory of the plaintiff that the deed of December 19, 1854, covered flats southeasterly of the Old Penny Ferry lot, and he bases this contention on the ground that "that case expressly decides (both Amos and P. J. Stone being parties) that the boundary line upon the east" is the line of the old Penny Ferry lot, and is the line described in the deed of June 1, 1854. We are of opinion, however, that *Gerrish v. Gary* is not fatal to this contention. *Gerrish v. Gary* was a case in which the proprietor of the upland adjoining the land conveyed by the deed of June 1, 1854,

on the east, claimed that the flats between high and low water mark should be divided between him and Gary according to the general rule, namely, by a line extended at right angles to the general course of the shore at high water mark. A line so drawn would have run from the stone bound in the side line of the Penny Ferry lot at high water mark northwest at an angle of seventy degrees with the southeasterly boundary line of the Penny Ferry lot given in that deed.

The land described in the amended declaration in *Gerrish v. Gary* was triangular in shape and was bounded on the southeast by the southeasterly boundary line of the Penny Ferry lot given in the deed of June 1, 1854; on the west, by low water mark, and on the north by the line run according to the general rule at right angles with the general course of the shore. The issue in that case was whether the land described in the writ belonged to the demandant. It was held that it did not. The question in that case was whether the line drawn at right angles to the general course of the shore, or the boundary of the Penny Ferry lot, was the line of division of the flats at this point, and it was decided that it was the latter. The demandant assumed that the southeasterly boundary of the Penny Ferry lot given in the deed of June 1, 1854, was the boundary of that lot, and that that lot did not extend beyond that line, and that no flats beyond that line were conveyed by the deed of December 19, 1854; and demanded the flats lying northwest of that line only. It was held that the flats demanded belonged to the tenant. It is consistent with that decision that the tenant owned more on the southeast than the demandant claimed in his writ, because the true boundary of the Penny Ferry lot was not that given in the deed of June 1, 1854; the true boundary of the Penny Ferry lot on the southeast was not in issue, and for that reason it may at least be doubted whether the statement by the court in *Gerrish v. Gary* as to the boundary line on the southeast is decisive of the rights of the parties. However that may be, it appears from the original papers in *Gerrish v. Gary* that John Gary was the sole person impleaded as tenant, and that Amos and Phineas Stone were not parties to that suit. The writ is dated October 3, 1864, and on October 3, 1864, Gary owned only one quarter of the land conveyed to him by the city of Charlestown in 1854, and the

legal title to only one quarter thereof stood in his name. Under these circumstances, it would seem that Amos and Phineas Stone at least were not concluded by the decision in *Gerrish v. Gary* if that case can be taken as concluding anybody, as to the southeasterly boundary line of the Penny Ferry lot. We are of opinion that it does not lie in the mouths of the defendants, Joseph Stone and his associates, who are claiming to hold land southeast of the boundary line between Boston and Everett under the deed of December 19, 1854, to claim that that deed did not operate on land in the town of Everett.

This disposes of the defendant's main contention, that the release of February 1, 1880, applies to the land conveyed by the deed of June 1, 1854; his main contention on that point was that the land described in the deed of December 19, 1854, was not described as lying in Charlestown and in Everett, while the land described in the deed of June 1, 1854, was so described. When it is established that part of the flats covered by the deed of December 19, 1854, were in fact in Charlestown, and that the grantees still claim that flats in Everett did pass under it, that argument falls to the ground.

The other grounds on which the defendant contends that the release of 1880 covers the land described in the deed of June 1, and not that described in the deed of December 19, are: First, that it is a parcel formerly conveyed by Gary to P. J. Stone; but that is equally true of both parcels; the deed of May 1, 1856, conveys to Phineas one undivided half of the land conveyed by the deed of June 1, 1854, and also one undivided half of the land and flats conveyed by the deed of December 19, 1854. Second, that it is a parcel formerly conveyed by the city of Charlestown to Gary; that is equally true of both parcels. Third, that the release speaks of purchase money being paid and of improvements made; so far as the release of February 1, 1880, implies that there was separate purchase money for the land described in the deed of December 19, 1854, it does not fit the facts; so far as improvements are concerned, we have already alluded to the pile wharf built outside of low water mark in the years 1857 and 1858; that was an improvement on land covered by the deed of December 19, 1854. Fourth, it is argued that the land conveyed by the deed of December 19,

1854, was land adjoining Malden Bridge, and the land in Everett which it is contended was conveyed by that deed adjoins the Penny Ferry lot and is separated from Malden Bridge by the width of that lot. But it is not true that the only land conveyed by the deed of December 19 was land adjoining Malden Bridge. The final clause of the deed covers land adjoining the Penny Ferry lot as well as land adjoining the bridge; the final clause conveys "all the land and flats if any there be, which formerly belonged to said Penny Ferry situated southerly of said line above described [the southeasterly boundary line of the Penny Ferry lot in the deed of June 1, 1854] and easterly of said Bridge." Fifth, it is also objected that, according to the plaintiff's contention, flats passed by the deed of December 19, and what is spoken of in the release dated February 1, 1880, is "a parcel of land." So far as that is concerned, flats are land and are not improperly described as such. And finally, sixth, that P. J. Stone did not own half the land described in the deed of December 19, 1854, at the date of the release in 1880. That is true; but it is equally true that he did not own one half the land covered by the deed of June 1, 1854. He had conveyed at least one third of one half of the land and flats covered by both deeds to Sewall, and that deed in terms covers both the land conveyed by the deed of June 1 and the land conveyed by the deed of December 19.

This case is not like the cases of *Cassidy v. Charlestown Five Cents Savings Bank*, 149 Mass. 325; *Dow v. Whitney*, 147 Mass. 1; *Lovejoy v. Lovett*, 124 Mass. 270, relied on by the defendant. In those cases, a parcel of land is described at length, and then follows a clause stating in substance that they are the same premises as those described in a prior deed, which deed did not convey the premises described. In this case, on the contrary, the only description of the land conveyed is that it is the land covered by the prior deed.

If any of the matters to which we have adverted make the deed of December 19, 1854, ambiguous, then the question arises whether the improbability of Amos conveying his interest in the flats covered by the deed of December 19, 1854, and keeping his interest in the land conveyed by the deed of June 1, 1854, is so great as to overcome the other facts in evidence, namely,

(1) that the land conveyed is described as the land covered by the deed of December 19; (2) that after the date of this release of February 1, 1880, no change was made in the treatment of the property; (3) that after that date, as before it, Amos was treated as the owner of one quarter interest for the eleven years during which his brother Phineas, the father of the defendant Joseph Stone, lived, and for the four years after the death of Phineas during which Phineas' clerk was living, and finally, (4) that in 1891, the defendant Joseph, being duly authorized by the owners, Phineas J. Stone one quarter interest, Amos Stone one quarter interest, and others, offered a part of this land for sale — the question whether, under these circumstances, it would be held that the release of February 1, 1880, ever took effect, is not now before the court. What is before the court is, Whether, on all the evidence, there is enough to overcome the express provision in the release of February 1, 1880, that it applies to the land described in the deed of December 19, 1854; and we are of opinion that there is not.

For the same reasons, we are of opinion that the recitals in the release of February, 1880, do not overcome the conclusion which we have heretofore stated, that between May, 1856, and October, 1863, Phineas made a deed to Amos of his one third of the one half of the legal title which was conveyed to Phineas by Gary. In the first place, the verbal agreement recited in the release of February, 1880, does not fit the facts; that is an agreement by Phineas to convey "an undivided half part of his interest" on Amos paying "one-half of the purchase money"; that is to say, on Amos paying one half of the purchase money for one half, he is to convey one half of one half. So far as the half interest conveyed to Phineas by Gary is concerned, Amos was to have one third, and although ultimately Amos was to have one quarter, that one quarter was not to be carved out of an interest conveyed to Phineas; one quarter of the whole was conveyed to Amos by Howland, and after he conveyed to Phineas and Sewall one twelfth each, he had one twelfth left in himself which, together with Amos' one third of the one half conveyed to Phineas made up his one quarter. In the second place, in February, 1880, Phineas was not possessed of one half, under any possible theory; he had the legal title to five twelfths

if no conveyance of Amos' one third of one half had been made, and the legal title to one quarter if that conveyance had been made. In the third place, Phineas never paid out any purchase money, either for the land covered by the deed of June 1, 1854, or for that described in the deed of December 19, 1854. It is found by the master, who had books, papers, and accounts before him which are not all of them annexed to the report, that "no valuable consideration was paid by Gary, but that the mortgage which he gave the city was for the whole consideration, so that no money payment was made by him. Nor do I find that any payment has been made by him or any of his grantees towards the extinguishment of the mortgage debt, except such sums as have been received from a conveyance by Gary of a part of said premises, . . . and also such sums as have been received from the rents and profits of the estate."

For these reasons, in view of the facts already dwelt on at length, we are of opinion that the release of February 1, 1880, if it ever took effect at all, applied to the flats covered by the deed of December 19, 1854, and not to the land described in the deed of June 1, 1854.

Order overruling defendants' exceptions to the master's report and decree for the plaintiffs affirmed.

MYRON R. FISKE vs. INHABITANTS OF HUNTINGTON.

Hampshire. September 17, 1901. — October 17, 1901.

Present: HOLMES, C. J., KNOWLTON, LATHROP, & BARKER, JJ.

School. Municipal Corporations.

St. 1898, c. 496, § 3, provides as follows: "No member of the school committee of a town in which a public high school or a school of corresponding grade is not maintained shall refuse to approve the attendance of any child residing in such town in the high school of some other town or city if such child has completed the course of instruction provided by the former town, and, in the opinion of the superintendent of schools or the school committee of said former town, is properly qualified to enter such high school. If the school committee of such town refuses to grant such approval such town shall be liable for the tuition of such child, in the same manner and to the same extent as if the parent or guardian

of such child had obtained the approval of the school committee." Under this statute a parent made a request of the school committee of a town of the class described in the statute maintaining no high school or school of corresponding grade, for their approval of the attendance of his child at the high school of a neighboring town. The request was not granted and no reason was given for not granting it. The child had completed the course of instruction provided by the home town. The father sent his child to the high school in the neighboring town and sued the home town under the statute for the sum paid for tuition. It appeared, that the child might have gone on with his studies in the home town in some unusual way and probably have been as far advanced as he was by attending the high school in the neighboring town, and thus have been ready to enter the high school which was established the next year in the home town. *Held*, that these facts warranted, if they did not require, a finding that the school committee refused to grant their approval of the attendance, and that such refusal made the town liable under the statute.

Article 18 of the Amendments to the Constitution is as follows: "All moneys raised by taxation in the towns and cities for the support of public schools, and all moneys which may be appropriated by the State for the support of common schools, shall be applied to, and expended in, no other schools than those which are conducted according to law, under the order and superintendence of the authorities of the town or city in which the money is to be expended; and such moneys shall never be appropriated to any religious sect for the maintenance, exclusively, of its own school." St. 1898, c. 496, § 3, provides that "Any town of less than five hundred families or householders in which a public high school or a school of corresponding grade is not maintained shall pay for the tuition of any child who resides in said town and who attends the high school of another town or city, provided the approval of such attendance by the school committee of the town in which the child resides is first obtained. If any town in which a public high school or a school of corresponding grade is not maintained neglects or refuses to pay for tuition as provided in this section such town shall be liable therefor to the parent or guardian of the child furnished with such tuition, if the parent or guardian has paid for the same, and otherwise to the town or city furnishing the same, in an action of contract." There is a further provision making the town liable if the school committee refuses its approval of such attendance in a case covered by the statute. *Held*, that the statute is constitutional. The words of the amendment requiring expenditures to be confined to schools "which are conducted according to law, under the order and superintendence of the authorities of the town or city in which the money is to be expended" as applied to this statute mean the town or city in which the school is where the tuition is given and where payment for it is to be made.

CONTRACT under St. 1898, c. 496, § 3, against the town of Huntington, to recover \$125 paid by the plaintiff to the town of Westfield for the tuition of a child of the plaintiff at the high school of the last named town. Writ dated July 30, 1900.

At the trial in the Superior Court, before *Pierce, J.*, without a jury, the defendant contended, that the plaintiff had not brought himself within the statute, and further, that the statute was unconstitutional, and asked the judge to rule, that upon all

the evidence the action could not be maintained. The judge refused so to rule, and found for the plaintiff; and the defendant alleged exceptions.

W. G. Bassett & E. L. Shaw, for the defendant.

E. H. Lathrop, for the plaintiff.

KNOWLTON, J. The St. 1898, c. 496, § 3, contains provisions as follows: "Any town of less than five hundred families or householders in which a public high school or a school of corresponding grade is not maintained shall pay for the tuition of any child who resides in said town and who attends the high school of another town or city, provided the approval of such attendance by the school committee of the town in which the child resides is first obtained." Then we have a provision for recovery from the town by the parent or guardian who has paid for the tuition, if the town neglects or refuses to pay for it, with other language as follows: "No member of the school committee of a town in which a public high school or a school of corresponding grade is not maintained shall refuse to approve the attendance of any child residing in such town in the high school of some other town or city if such child has completed the course of instruction provided by the former town, and, in the opinion of the superintendent of schools or the school committee of said former town, is properly qualified to enter such high school. If the school committee of such town refuses to grant such approval such town shall be liable for the tuition of such child, in the same manner and to the same extent as if the parent or guardian of such child had obtained the approval of the school committee."

The first question in the case is whether the agreed statement and the evidence warrant a finding of facts which, by the terms of the statute, create a liability. The town is such as is described in the statute, and no high school or school of corresponding grade was maintained in it. It is agreed that the plaintiff's minor children were "prepared for a high school," which we understand to mean that they had completed the course of instruction provided by the defendant town, and were properly qualified to enter a high school. This view is confirmed by the testimony of their teacher. Their parents were desirous of having them take a course in a high school at the expense of

the town. This being so, it is immaterial that they might have gone on with their studies in that town in some unusual way and probably have been as far advanced as they were by attending the high school in Westfield that year, and thus have been ready to enter the high school which was established in Huntington the next year.

The plaintiff made a formal request of the committee for their approval of the attendance of these children at the high school in Westfield, a neighboring town. This request was not granted. So far as appears no reason was given, and no good reason existed, for the failure to grant it. These facts well warranted, if they did not require a finding that the school committee refused to grant their approval of the attendance. Such a refusal makes the town liable for the tuition under the statute.

The only other question is whether the statute is constitutional. That some proper provision for the education of children in high schools and other public schools may be required of towns by the Legislature, is not questioned. It is equally clear that in the making of such a provision, payment of tuition by a town, in a school where tuition is charged, is within the general purposes for which money may be raised by taxation, unless there is some special constitutional prohibition of such payments. The defendant relies on the eighteenth of the Articles of Amendment to the Constitution, which is as follows: "All moneys raised by taxation in the towns and cities for the support of public schools, and all moneys which may be appropriated by the state for the support of common schools, shall be applied to, and expended in, no other schools than those which are conducted according to law, under the order and superintendence of the authorities of the town or city in which the money is to be expended; and such moneys shall never be appropriated to any religious sect for the maintenance, exclusively, of its own school." In *Merrick v. Amherst*, 12 Allen, 500, 508, it is said that "The object of the provision is to regulate the expenditure of money raised by towns or cities for general educational purposes, and to confine it strictly to the support of the common or public schools, which every town is required to maintain under the general laws, . . . and also to restrain the raising of money by taxation for the support of schools of a religious

and sectarian character." See also *Jenkins v. Andover*, 103 Mass. 94.

In an opinion of the attorney general, given at the request of the Honorable Senate, it was said that the St. 1895, c. 94, which authorizes any town in which a high school is not maintained to grant and vote money to pay the tuition of children residing in such town and attending an academy maintained therein, provided the academy is approved for that purpose by the state board of education, is unconstitutional. 1 Opinions of the Attorneys General, 319. If, for the purposes of this case, we assume in favor of the defendant without deciding, that the learned attorney general was correct in giving to the words "all moneys raised by taxation in the towns and cities for the support of public schools," a construction broad enough to include money paid for tuition of individual scholars in incorporated academies not conducted by the public authorities nor established or managed as any part of the public school system of the Commonwealth, it does not follow that there is any good ground of objection to the statute under which this suit was brought. The schools referred to in this statute "are conducted according to law, under the order and superintendence of the authorities of the town or city in which the money is to be expended," and these quoted words designating the town or city, as applied to a case like the present, mean the town or city in which the school is where tuition is given and where payment for it is to be made, rather than the town or city that makes the payment.

The Legislature at different times has assumed that similar provisions are constitutional, and a like assumption is found in decisions of this court. Pub. Sts. c. 44, §§ 3, 44. Sts. 1888, c. 431; 1893, c. 200; 1894, c. 498, §§ 6-8; 1894, c. 436; 1895, c. 212; 1901, c. 44. *Millard v. Egremont*, 164 Mass. 430. *Hurlburt v. Boxford*, 171 Mass. 501.

Exceptions overruled.

JOHN COOK vs. LEON G. BARTLETT.

Hampshire. September 17, 1901. — October 17, 1901.

Present: HOLMES, C. J., KNOWLTON, LATHROP, & BARKER, JJ.

Evidence, Proof of acknowledgment, Proof of law of foreign State. Seduction. Damages. Practice, Civil, Charging jury.

By the law of Vermont an instrument of adoption of a child is required to be acknowledged before the judge of probate of the district where it is filed. A certified copy of such an instrument, introduced as evidence of adoption, showed the certificate of acknowledgment to be signed as follows: "Before me, Fred. G. Field, Notary Public" and below and a little to the left "Hugh Henry, Judge of Probate, Dist. of Windsor." The Vermont statute provides, that the instrument shall be recorded, "if it appears to the Probate Court that the provisions of the statute have been complied with." This instrument was recorded. *Held*, that there was nothing in the statute or in the record to give to the signature of the judge of probate any other meaning than that which it should have as evidence that the paper was acknowledged before him as required by the statute, and that the natural inference was that the judge knew that the law had been complied with by an acknowledgment before him.

What is the law of a foreign State is primarily a question of fact, but, so far as it appears in statutes and decisions which are not conflicting, the construction of the language is for the court.

In an action for seduction, the plaintiff cannot recover unless he shows a loss of services to which he was entitled, but, if his right to recover is established, his damages may include compensation for the injury to his feelings, and for the dishonor and disgrace brought upon him and his family.

Where the judge in charging a jury in an action for seduction used language which might seem to indicate that his opinion on the matters referred to was favorable to the plaintiff, and where it would have been better if his expressions had been more guarded, yet if taking the charge as a whole no intentional argument or expression of opinion appears, there is not a violation of Pub. Sts. c. 158, § 5, nor such error as would justify disturbing a verdict for the plaintiff.

TORT to recover for loss of services of Lilla B. Cook, the plaintiff's adopted daughter, by reason of her alleged seduction by the defendant. Writ dated July 14, 1900.

At the trial in the Superior Court, before *Bond, J.*, the defendant asked for the following instructions: 1. Upon all the evidence the plaintiff is not entitled to recover. 2. The plaintiff cannot recover unless physical injury causing impairment of health and consequent inability to render service was the proximate result of the defendant's act. 3. The plaintiff cannot recover for loss of services resulting from mental distress, unless

the mental distress causes impairment of health and consequent inability to render services and is the direct and immediate result of the defendant's act. 4. The plaintiff cannot recover unless there has been actual loss of service, the direct and proximate result of the defendant's act. 5. The plaintiff cannot recover unless there has been loss of capacity to render service, the direct and immediate result of the defendant's act. 6. The plaintiff cannot recover unless the jury is satisfied that his daughter was disabled from rendering service and that the defendant's unlawful act was the direct and immediate cause of her disability. 7. The plaintiff cannot recover for any shame caused to himself or his family. 8. The plaintiff cannot recover for loss of or injury to reputation of himself or family. 9. The plaintiff cannot recover for disgrace suffered by himself or family. 10. The plaintiff cannot recover for any dishonor to himself or family. 11. The plaintiff cannot recover on account of injury to the reputation of his daughter. 12. The plaintiff cannot recover exemplary, vindictive, or punitive damages. 13. There is no evidence that Lilla B. Cook was ever legally adopted by the plaintiff. 14. The plaintiff cannot recover for anything except loss of Lilla's services. 15. There is no evidence that the articles of adoption were acknowledged in accordance with the laws of Vermont.

The judge against the defendant's exception refused to give these rulings and gave other instructions which the court holds to have covered in substance the second, fourth, fifth and sixth requests, and the third, which is also held to be immaterial.

The judge's charge contained the following passages, which were excepted to by the defendant:

"Now you have a right to consider the probability with reference to such testimony, whether the father and mother by adoption of this young woman would have any reason whatever to bring this young woman here to testify in this case, if it was not true, merely to get some money. You have a right to take into consideration the testimony with reference to the relation that had existed between these people and this young woman. She had lived with them. I think it was the mother who said they took her when she was twelve or fifteen months old. The young woman herself says she never knew any other home. They

brought her up, they took care of her, and you have seen something of the way she had been treated, and you may say what the probability is, whether they would bring her here to testify to her own disgrace for the sake of a sum of money, perhaps not exactly selling the girl, but selling all they could ever take any pride in, in the child."

"There is one matter that I desire to call your attention to with reference to this case that makes this class of cases extremely important. In this Commonwealth we all of us take pride in believing that we live under the law, that we settle our difficulties under the law, and not, as we sometimes say, by taking the law into our own hands. In some localities in this Union this case would never have been heard of in the civil or criminal court. Probably one of the parties would not have lived to be tried anywhere for any offence. But that is not the way we do in this Commonwealth. . . . It does not do any good, it is of no advantage to find a verdict against a party who is not guilty, but it is of importance that the jury should feel that it is of some service to the community, where the party is guilty, that they should say so by their verdict."

The jury returned a verdict for the plaintiff in the sum of \$800; and the defendant alleged exceptions.

C. G. Gardner, for the defendant.

S. S. Taft, for the plaintiff.

KNOWLTON, J. The defendant's first contention is that there was error in permitting the jury to find on the evidence that Lilla B. Cook was legally adopted as the plaintiff's daughter under the laws of Vermont, where the parties resided at the time of the adoption. Under the law of that State the instrument signed and sealed by the adopting parents, and by a parent, guardian or representative of the child, must be acknowledged before the judge of probate of the district where it is to be filed. The certified copy of the record shows that the proceedings followed the statute exactly, unless the signatures below the certificate of acknowledgment fail to show an acknowledgment before the judge of probate. The certificate is in the prescribed form, but after the words, "Before me," we have two official signatures, as follows: "Fred. G. Field, Notary Public," "Hugh Henry, Judge of Probate, Dist. of Windsor," the last appearing

in the copy of the record below the first and a little to the left of it. We find nothing in the statute or in the record to give to this signature of the judge of probate any other meaning than that which it should have as evidence that the paper was acknowledged before him as required by the statute. Moreover, the statute provides that the instrument shall be recorded, "if it appears to the Probate Court that the provisions of the statute have been complied with." This instrument was recorded. The natural inference is that the judge knew that the law had been complied with by an acknowledgment before him.

What is the law of a foreign State, is primarily a question of fact, but so far as it appears in statutes and decisions which are not conflicting, the construction of the language is for the court. *Wylie v. Cotter*, 170 Mass. 356. *Ufford v. Spaulding*, 156 Mass. 65. *Bride v. Clark*, 161 Mass. 130. Whether enough appears in the record and statutes introduced in this case to justify an instruction as matter of law that upon the undisputed facts the child was legally adopted, we need not decide. The instruction submitting the question to the jury was sufficiently favorable to the defendant.

The defendant's second, fourth, fifth and sixth requests for instructions were covered by the charge. Although the words "direct" and "proximate" were not used, the jury were told repeatedly in different forms of expression, that in order to return a verdict for the plaintiff they "must be satisfied that the inability to render the services was due to the seduction."

The third request was not founded on any evidence in the case. There was no testimony indicating that the plaintiff lost services of his daughter on account of her mental distress, or that she suffered mental distress. Moreover, the instructions given permitted the plaintiff to recover only for loss of services which occurred by reason of the seduction.

The seventh, eighth, ninth, tenth, eleventh and fourteenth requests for rulings are all founded on the contention of the defendant that if the plaintiff established his right to recover, the damages allowed were to be confined to compensation for loss of services. But this is not the law. The plaintiff in such an action cannot recover unless he shows a loss of services to which he was entitled; but if his right to recover is established,

his damages may include compensation for the injury to his feelings, and for the dishonor and disgrace brought upon himself and his family. *Phillips v. Hoyle*, 4 Gray, 568. *Treanor v. Donahoe*, 9 Cush. 228, 229, 230. *Stowe v. Heywood*, 7 Allen, 118, 122. *Hatch v. Fuller*, 131 Mass. 574.

The remaining exceptions are to two paragraphs in the charge, on the ground that they tended improperly to influence the jury by way of argument and by an expression of opinion, and that they were a violation of the Pub. Sts. c. 158, § 5, which forbids judges to charge jurors with respect to matters of fact. In these paragraphs there is language which might seem to indicate that the opinion of the judge on the matters referred to was favorable to the plaintiff. We think it would have been better if the expressions had been more guarded; but when we consider the instructions as a whole, and read this language in connection with other parts of the charge, we are of opinion that no intentional argument or expression of opinion appears, and that there is no such error as would justify us in disturbing the verdict. See *Harrington v. Harrington*, 107 Mass. 329; *Morrissey v. Ingham*, 111 Mass. 63.

Exceptions overruled.

GORDON H. JOHNSON vs. LYMAN W. GRISWOLD.

Franklin. September 17, 1901. — October 17, 1901.

Present: HOLMES, C. J., KNOWLTON, LATHROP, & BARKER, JJ.

Dog, Statutory liability for injuries by. *Constitutional Law*.

In St. 1889, c. 454, giving damages for sheep killed or injured by dogs, § 1 provides, that when the damages are appraised, the county treasurer shall submit the certificate of damages to the county commissioners, who within thirty days shall examine the bill for damages and make such investigation as they think proper, and issue an order upon the county treasurer for all or any part of the damage. *Held*, that the requirement in regard to the time of the examination is for the benefit of persons claiming damages, and, in the absence of a request by an interested party for an early examination, is only directory, and the failure of the commissioners to act within thirty days does not render their subsequent action in favor of an injured party invalid.

Under St. 1889, c. 454, giving damages for sheep killed or injured by dogs, the return under § 1 of a certificate of damages which contains a slight inaccuracy

as to the ownership of the sheep but complies with the essential requirement of an oath as a preliminary to the appraisal, and which contains enough to identify the proceedings and justify the introduction of oral testimony to correct the error as to the title, does not leave the case as if there were no certificate but satisfies the statutory requirement that a certificate shall be returned.

St. 1889, c. 454, and St. 1894, c. 309, giving damages for sheep killed or injured by dogs, are constitutional.

TORT, under St. 1894, c. 309, by a person appointed by the county commissioners of Franklin County under St. 1889, c. 454, § 5, to investigate cases of damage done by dogs, to recover money paid out of the dog fund by the county treasurer on the order of the county commissioners for damage done to sheep by a dog of the defendant. Writ dated February 12, 1900.

At the trial in the Superior Court, before *Pierce, J.*, the jury returned a verdict for the plaintiff in the sum of \$190.75; and the defendant alleged exceptions.

S. S. Taft, for the defendant.

S. D. Conant, for the plaintiff.

KNOWLTON, J. This action is brought under the St. 1889, c. 454, § 5, and St. 1894, c. 309, to recover an amount of money paid by order of the county commissioners for damage done to sheep by the defendant's dog. By St. 1889, c. 454, § 1, such damages are to be appraised under oath, a certificate of the appraisal is to be returned to the treasurer of the county within ten days, the treasurer is to submit the certificate to the county commissioners, and they, within thirty days, are to examine the bill for damages and make such investigation as they think proper, and "issue an order upon the treasurer of the county in which the damage was done for all or any part thereof as justice and equity may require." By other sections of these statutes there are requirements for an appointment by the county commissioners of a suitable person residing in the county to investigate cases of damage done to sheep by dogs, and for the bringing of actions against the owners of such dogs by this person, in his own name, in certain cases.

In the present case proceedings were taken which entitle the plaintiff to recover, according to the terms of the statute, unless two or three objections made by the defendant are well founded. First, the certificate of the appraisal, which was duly returned to the treasurer of the county and was by him submitted to the

county commissioners, was not examined and ordered paid by them until after the expiration of thirty days. This requirement in regard to the time of the examination by the commissioners is for the benefit of persons claiming damage, and it seems to imply that bills will be presented by them. In our opinion, in the absence of a request by an interested party for an early examination, it is only directory, and the failure of the commissioners to act within thirty days does not render their subsequent action in favor of an injured person invalid.

The next objection to the proceeding is that it does not appear that the sheep were properly appraised, or that a proper certificate of appraisal was returned. The certificate makes no express statement in regard to the ownership of the sheep, but deals with damage "inflicted by dogs on the premises of Mrs. C. E. Adams and daughters and within said town of Greenfield." The certificate of the magistrate shows that the appraisers made oath to appraise the damage done by dogs "to sheep belonging to Charlotte E. Adams and daughters," and inferentially represents the sheep to be the property of Charlotte E. Adams and daughters. By the statute this certificate is made the foundation of proceedings before the commissioners, in which they "may summon the appraisers and all parties interested and make such examination as they may think proper." The statute nowhere provides that the certificate shall be the only evidence of the facts, or that an error in it, however slight, shall be fatal to the proceedings.

The defendant invokes the principle that a statutory liability cannot be enforced unless the statute is strictly complied with. This is true so far as it relates to matters made essential by the statute. It is essential under this statute that the damage to be recovered shall be appraised under oath. The bill of exceptions makes the identity of the damages appraised and those to which the oath relates free from doubt. The certificate indicates that at the time of the administration of the oath and at the time of the appraisal, although the name of but one person is given as owner, it was supposed by the appraisers that Mrs. Adams' unnamed daughters had some interest with her in the sheep. On the examination before the county commissioners, it appeared that there was a mistake in this particular, and that

she was the sole owner of the property. The bill of exceptions does not show that any of the preliminary or accompanying proceedings were irregular or incorrect. It is to be assumed that Mrs. Adams did everything that was necessary to protect her rights. The principal object of the appraisal was not the determination of the title, but the determination of the damage. It being proved that the damage which the appraisers were sworn to appraise was the damage to sheep of which it afterwards appeared that Mrs. Adams was the sole owner, the essential requirement of an oath as a preliminary to the appraisal is complied with. The return of a certificate which is only slightly inaccurate is a compliance with the other essential requirement that a certificate shall be returned. We are of opinion that the slight inaccuracy in regard to the title, when there was a substantial compliance with the statute according to the purpose of its authors, does not leave the case as if there were no certificate. The certificate contained enough to identify the proceeding, and to justify the introduction of oral testimony to correct the error as to the title.

The statutes are constitutional. No questions arise under this branch of the case beyond those that have been considered and passed upon in former decisions. *Blair v. Forehand*, 100 Mass. 136. *Worcester County v. Ashworth*, 160 Mass. 186.

Exceptions overruled.

GEORGE W. JENKS, administrator, vs. CHARLES E. HOAG.

Hampden. September 24, 1901. — October 17, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Action, Survival.

If an action lies against an attorney at law for conspiring with a client under examination as a poor debtor to prevent, by false testimony of the client, certain money of the client from being taken on execution, such an action does not survive under Pub. Sts. c. 165, § 1, the injury not being "damage done to real or personal estate" within the meaning of that statute.

TORT to recover damages for an alleged conspiracy of the defendant, an attorney at law, with his client under examination as a poor debtor, to prevent, by false testimony of the client, the plaintiff's intestate from obtaining an order for the application of certain money of the client in satisfaction of an execution held by the plaintiff's intestate against her. Writ dated March 17, 1900.

The plaintiff's declaration alleged in substance, that the plaintiff's intestate recovered a judgment against Charles W. Shaw and Jennie G. Shaw; that execution thereon was duly issued and demand made upon the judgment debtors for payment, which was refused; that thereafter Jennie G. Shaw was cited to appear and submit to an examination regarding her property; that she appeared and that the defendant acted as her attorney; that at the beginning of the examination she owned a half interest in a certain partnership, which half interest was worth \$300 and was more than sufficient to satisfy the judgment; that during the progress of the examination she sold her interest in the partnership and received therefor \$300, which was not exempt from execution; that the defendant, with full knowledge of the premises, conspired with the above named Jennie G. and Charles W. Shaw to conceal this property and to deceive the court as to the judgment debtor's condition; that Jennie G. Shaw in the presence of the defendant, and with his knowledge and assent, in answer to interrogatories submitted to her during the examination, stated that she had no property not exempt from execution except the partnership interest, which was of little or no value; that the defendant with knowledge of the sale of the partnership interest and the amount of money obtained therefor, presented a statement to the court, signed by Jennie G. Shaw and sworn to before the defendant as a justice of the peace, to the effect that only \$40 had been realized from the sale of the partnership interest, which money had all been expended; that by reason of this conspiracy and the acts of the defendant the court was deceived and induced to believe that Jennie G. Shaw had no property not exempted from execution, and withheld its order requiring her to produce sufficient of her money to satisfy the judgment of the plaintiff's intestate, whereby the judgment was rendered worthless.

The defendant demurred to the declaration and also answered. The plaintiff demurred to the defendant's answer and also replied.

In the Superior Court, *Aiken, J.*, sustained the demurrer to the declaration and gave judgment for the defendant; and the plaintiff appealed.

J. L. Rice, for the plaintiff.

C. E. Hoag & S. S. Taft, for the defendant.

KNOWLTON, J. This case is before us on the plaintiff's appeal from an order sustaining the defendant's demurrer, and directing a judgment for the defendant. A question much discussed by the parties is whether the averments of the declaration state a case of damage directly resulting from the defendant's wrong, which can be the foundation of a judgment in an action of tort. The allegations of the declaration virtually charge the defendant with subornation of perjury. He is accused of having conspired with his client to present false testimony which should prevent the plaintiff's intestate from obtaining an order for the payment to him of a sum of money. The defendant contends that this case is governed by the decisions in many cases which hold that no action lies for conspiring with a debtor to fraudulently dispose of his property to keep it away from his creditors. See *Lamb v. Stone*, 11 Pick. 527; *Wellington v. Small*, 3 Cush. 145; *Bradley v. Fuller*, 118 Mass. 239; *Adler v. Fenton*, 24 How. 407; *Austin v. Barrows*, 41 Conn. 287; *Klous v. Hennessey*, 13 R. I. 332; *Moody v. Burton*, 27 Maine, 427; *Hall v. Eaton*, 25 Vt. 458.

None of these cases is identical with the present case, and it is unnecessary to determine whether the principles established by them are so far applicable to the facts set out in the declaration as to be decisive of the question. We are of opinion that the demurrer was rightly sustained on another ground. This action is brought by the administrator of the original judgment creditor to whom the wrong is alleged to have been done. It is a general rule that actions of tort do not survive. Pub. Sts. c. 165, § 1. The statute creates certain exceptions to this rule, of which the only one necessary to be considered is that referring to actions "for damage done to real or personal estate." The plaintiff contends that this case falls within this exception, and

argues that the suit is brought to recover for damage done to the judgment, which is personal estate.

It has been decided repeatedly that "a mere fraud or cheat by which one sustains a pecuniary loss cannot be regarded as a damage done to personal estate." *Leggate v. Moulton*, 115 Mass. 552, and cases there cited. See also *Cutter v. Hamlen*, 147 Mass. 471. The statute was intended to give a remedy which should survive only for injuries of a specific character "to real or personal estate." In the case last cited there was no damage done to the plaintiff's real or personal estate, and in the present case there was no damage done to the judgment, considered as a specific part of the property of the plaintiff's intestate. The judgment was entirely unaffected by the defendant's alleged wrong. The wrong was not directed towards the judgment itself. At the most, it merely rendered ineffectual one of the methods by which the creditor hoped to collect the judgment. It seems to us plain, therefore, that the case does not fall within this exception, and that the entry must be,

Judgment affirmed.

THOMAS BLANCHARD vs. GEORGE W. ELY.

Hampden. September 24, 1901. — October 17, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Liens, Petition under Pub. Sts. c. 192, § 24. *Practice, Civil*, Delivery of a paper required by statute.

Pub. Sts. c. 192, § 24, providing for the enforcement of certain liens by petition, requires a demand in writing to be "delivered to the debtor or left at his usual place of abode, if within this commonwealth, or made by letter addressed to him at his usual place of abode without the commonwealth and deposited in the post-office to be sent to him." On a petition under this statute to enforce a lien for keeping certain horses, it appeared, that the petitioner mailed a demand for the payment of the debt to the respondent at his residence in this Commonwealth and that the respondent received it the next morning. *Held*, that the delivery of the demand was good. The statute contemplates a delivery by the creditor himself or by any one for him, and the paper may be left at the usual place of abode of the respondent by a postal carrier as well as by an officer qualified to serve civil process. The provision for mailing a demand to a debtor without the Commonwealth merely prescribes a convenient method of making

a demand on such a debtor, and does not imply that a demand actually delivered through the post-office is ineffectual if the debtor resides within the Commonwealth.

PETITION under Pub. Sts. c. 192, § 24, to enforce a lien under § 82 of the same chapter for boarding and keeping certain horses of the defendant, filed in the District Court of Eastern Hampden, April 14, 1900.

Coming by appeal to the Superior Court, the case was tried before *Pierce, J.* It appeared, that the petitioner lived in Palmer and the respondent in Springfield, and that a demand in writing for the payment of the debt, sufficient under the statute if delivered to the respondent, was mailed by the petitioner in Palmer on April 2, 1900, addressed to the respondent in Springfield, and there received by the respondent the next morning. The respondent asked the judge to rule, that there was no sufficient evidence that any demand in writing was delivered to the debtor or left at his last and usual place of abode within ten days before the bringing of the petition in this action, and that there was no evidence that the provisions of Pub. Sts. c. 192, § 24, concerning a demand upon the debtor were complied with by the petitioner.

The judge refused so to rule, and, by consent of parties, instructed the jury to return a verdict for the petitioner. The respondent alleged exceptions.

A. Webster, S. S. Taft & D. E. Tilley, for the respondent.

D. F. Dillon & E. E. Hobson, for the petitioner.

KNOWLTON, J. This is a petition under the Pub. Sts. c. 192, § 24, to enforce a lien for keeping certain horses, the property of the respondent. The only question in the case is whether a demand for the payment of the debt was made as required by this section. A demand in writing in proper form was sent by mail to the respondent, and was received by him the next day at his place of residence in Springfield, to which it was addressed.

By the terms of the statute such a demand must be "delivered to the debtor or left at his usual place of abode, if within this commonwealth." The respondent contends that this must be by a formal service like that of a writ in an action at common law. But the statute makes no such requirement. The paper may be delivered to the debtor or left at his usual place of abode

by any person to whom the creditor sees fit to intrust it for that purpose. It may as well be delivered by a postal carrier in the service of the United States as by an officer qualified to serve civil process.

The language of the section which permits the demand upon the debtor to be "made by letter addressed to him at his usual place of abode without the commonwealth and deposited in the post-office to be sent to him," does not imply that a demand actually delivered through the post-office is ineffectual if the debtor resides in this State, but prescribes a convenient method of making a demand when the debtor lives outside of the Commonwealth without the necessity of proving that the paper reaches him. The statute contemplates that the delivery may be made by the creditor himself or by any one for him. Where no particular method of delivery is required, it is sufficient to prove that the demand or notice was in some way conveyed to the person to be affected thereby. See *Wilson v. Trenton*, 16 L. R. A. 200; *Burdett v. Lewis*, 7 C. B. (N. S.) 791; *Shoemaker v. Mechanics' Bank*, 59 Penn. St. 79; *Walters v. Brown*, 15 Md. 285, 292.

Exceptions overruled.

JULIUS GARST vs. HALL AND LYON COMPANY.

Worcester. September 30, 1901. — October 17, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Equity Pleading and Practice. Equity Jurisdiction. Trade-mark.

Where a bill in equity contains no averment of any fraudulent act or conduct on the part of the defendant, the use of the word "fraudulently" in characterizing his acts, adds nothing to the averments of fact in the bill.

In a suit in equity by the owner and manufacturer of a proprietary medicine, the trade-mark of which was registered in the patent office of the United States and in the office of the secretary of this Commonwealth, against a retail dealer in drugs and medicines, to restrain him from selling the medicine below a certain price, it appeared, that the medicine was sold by the plaintiff under a written contract by which the purchaser agreed that he would not sell nor allow any one in his employ to sell the medicine at less than a certain price per box, which was a higher price than that at which the defendant was selling it to the public, that the defendant bought the medicine knowing the conditions on which

it was sold by the plaintiff, but did not buy it from the plaintiff or from one who purchased it from him. There was nothing to show that the defendant had fraudulently induced or procured the breach of a contract between the plaintiff and any of his vendees. *Held*, that the contracts made with the plaintiff by the original purchasers could be enforced only against them, and that a purchaser from a purchaser had an absolute right to dispose of the property as he pleased.

A trade-mark does not give the proprietor the right to control the sale by others of articles of his manufacture. It is merely to secure him and the public from deception and fraud as to the origin and source of his goods and of similar goods sold in the market.

BILL IN EQUITY by the owner and manufacturer of a proprietary medicine known as phenyo caffein, which is made from a secret formula originated and owned by the plaintiff, the trade-mark of the medicine being registered in the United States patent office and in the office of the secretary of the Commonwealth of Massachusetts, against a corporation established under the laws of Rhode Island and having places of business in the cities of Worcester and Waltham in this Commonwealth as a retail dealer in drugs and medicines, to restrain the defendant from selling at retail phenyo caffein, the twenty-five cent size for less than twenty-five cents per box, and the ten cent size for less than ten cents per box, the prices fixed by the contract under which the medicine was sold by the plaintiff, filed January 10, 1901.

The defendant demurred to the bill and also filed an answer. In the Superior Court the case came before *Gaskill, J.*, who reserved it for the consideration of this court on the bill, demurrer, answer and agreed facts. All of the material facts are stated in the opinion of the court. The contract sought to be enforced is printed in full in *Garst v. Harris*, 177 Mass. 72.

W. Thayer & H. W. Cobb, for the plaintiff.

C. T. Tatman, for the defendant.

KNOWLTON, J. This case is reserved on the bill, demurrer, answer and agreed facts, the defendant's rights under the demurrer not being waived.

The plaintiff is the owner and manufacturer of a proprietary medicine known as phenyo caffein, which is made from a secret formula. His trade-mark for said medicine is registered in the patent office of the United States and in the office of the secretary of the Commonwealth of Massachusetts. The defendant

corporation is a retail dealer in drugs and medicines. The plaintiff sells all phenyo caffein subject to the conditions of a contract in which each purchaser agrees that he will not sell nor allow any one in his employ to sell it for prices less than those specified in the agreement for the different sizes of boxes, and promises to pay the plaintiff an agreed sum as damages if he violates this contract. The plaintiff also agrees, as a part of the contract, that in case the vendee at any time desires to discontinue the sale of this medicine and notifies the plaintiff in writing of that fact, he will buy of the vendee any of the medicine which he has on hand at the net cost price at which it was sold to him. Besides these facts the plaintiff's bill avers that the defendant, with full knowledge of the conditions under which the medicine is sold by the plaintiff, has fraudulently obtained large quantities thereof with the intention of retailing it in violation of these conditions and against the right of the plaintiff. The defendant demurs for want of equity and for other causes.

It is not averred that the defendant ever made any contract or agreement with the plaintiff, or had any dealings with him. No fraudulent act or conduct of the defendant in obtaining the medicine is set out, although the word "fraudulently" is used in characterizing his acts. This word adds nothing to the averments of fact in the bill. The statement of the alleged fraud is too general to be the foundation of a decree. *Nichols v. Rogers*, 139 Mass. 146. *Nye v. Storer*, 168 Mass. 53. The averments of the bill in this particular would be entirely satisfied by showing a purchase of the medicine by the defendant from a person who bought it of the plaintiff's vendee, or from one who bought it of a purchaser from the vendee. The agreed statement of facts shows that the defendant obtained it in this way. The defendant did not buy the medicine of the firm of wholesalers who received it from the plaintiff and who agreed to sell it subject to the above conditions, but bought it of a person who bought either from this firm or from a purchaser from this firm.

The transactions between the plaintiff and his vendee set out in the bill plainly are sales which pass the title to the property.

It is equally, or perhaps more plain that the contract contemplated sales by retailers which shall pass an absolute title to the

property. The purchaser from a purchaser has an absolute right to dispose of the property. He may consume it or sell it to another. The plaintiff has contracts from his vendees in regard to the prices at which they will sell if they sell at all. If they sell in violation of their contracts with the plaintiff he has a remedy against them to recover his damages. *Garst v. Harris*, 177 Mass. 72. This right is founded on the personal contract alone, and it can be enforced only against the contracting party. To say that this contract is attached to the property and follows it through successive sales which severally pass title is a very different proposition. We know of no authority nor of any sound principle which will justify us in so holding.

The plaintiff's trade-mark does not give him the rights of a patentee in property manufactured under a patent. His trade-mark is to secure him and the public from deception and fraud as to the origin and source of these goods and of similar goods sold in the market.

The law of copyright also gives privileges to authors and publishers that do not pertain to property which anybody may make and sell if he can; but even under the law of copyright, when the owner of a copyright and of a particular copy of a book to which it pertains, has parted with all his title to the book, and has conferred an absolute title to it upon a purchaser, he cannot restrict the right of alienation, which is one of the incidents of ownership in personal property. *Harrison v. Maynard*, 61 Fed. Rep. 689. See also *Clemens v. Estes*, 22 Fed. Rep. 899; *Meyer v. Estes*, 164 Mass. 457; *Waterman Co. v. Waterman*, 27 App. Div. (N. Y.) 138.

In the present case there was not only no contract between the plaintiff and the defendant, as in *Fowle v. Park*, 131 U. S. 88, but there is no averment or proof that the defendant fraudulently induced and procured the breach of a contract between the plaintiff and any of his vendees, to the detriment of the plaintiff, as did the defendant in *Exchange Telegraph Co. v. Central News*, [1897] 2 Ch. 48, and in *Standard American Publishing Co. v. Methodist Book Concern*, 38 App. Div. (N. Y.) 409.

Bill dismissed.

HAYWARD A. HARVEY *vs.* FRANK B. SMITH & another,
administrators.

Worcester. September 30, 1901. — October 17, 1901.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Mortgage, Power of sale.

A power of sale in a mortgage is a power coupled with an interest, which cannot be revoked by the mortgagor, and is not affected by a decree of a United States court, in a suit to which the mortgagee is not a party, enjoining the mortgagor from transferring any equitable or other interest in the mortgaged property.

BILL IN EQUITY by the mortgagor of a palace car called "Boston," to restrain the defendant Smith, one of the administrators of the estate of George Leonard, from foreclosing a mortgage thereon, filed December 15, 1899.

The answer of the defendant Smith admitted that he had taken possession of the car to foreclose the mortgage, and further admitted that the mortgage and note were in the possession of Thomas Weston, Esquire, as attorney for the defendant Truesdell, his co-administrator. He denied that Truesdell had objected to his action in the premises, and alleged that his action was taken with the knowledge and approval of Truesdell and Weston and on behalf of the mortgagees.

The defendant Truesdell alleged upon information and belief, that the defendant Smith had received from the plaintiff, or some one in his behalf, a large amount of money in part payment of the note, which had not been credited upon the note, and of which the defendant Truesdell was entitled to receive one half, and he alleged that it was not for the interest of the defendants that the car should now be sold at a foreclosure sale, but if upon the rendering of an account of the amount due to each of the defendants respectively it should appear that the foreclosure sale should proceed, he would then pray that such sale might be made for the benefit of both defendants, and prayed that an account might be taken of the sum due upon the mortgage to each of the defendants respectively.

By the master's report in the case, it appeared, that it was

agreed between the defendant Smith and the defendant Truesdell, in the presence of the master, that whenever there should be a sale or other disposition of the property covered by the mortgage, there should be charged against the share to be paid to the defendant Smith the sum of \$900 theretofore received by him, and the defendants agreed that there was no need of further accounting as between them.

The master found as a fact, if material, that the United States Circuit Court for the District of New Jersey on November 9, 1899, enjoined the American Palace Car Company, of New Jersey, and the American Palace Car Company, of Maine, and Hayward A. Harvey, the plaintiff, and others, "from assigning, transferring, selling, exchanging, or in any wise disposing of any of the patent rights or other property formerly of the Palace Car Company, of Maine, including any equitable or other interest of that company in the palace car 'Boston.'" He found by preponderance of the evidence that the palace car "Boston" referred to was the same as that referred to in the plaintiff's bill.

He also found as a fact, if material, that the stockholders of the American Palace Car Company of Maine, on August 11, 1897, voted to accept an offer to transfer the chattels and property of that company to one Mott, or to such person or corporation as he might elect, for the purpose of transferring the property to the American Palace Car Company of New Jersey, upon assumption by the New Jersey company of the liabilities of the Maine company, and of an exchange of stock in the proportion of two shares of the Maine company for one share of the New Jersey company.

The master found that no accounting was necessary, and that there was no evidence tending to show that an injunction should issue restraining the defendant Smith from selling the property described in the mortgage.

The Superior Court made a decree overruling the plaintiff's exceptions to the master's report and dismissing the bill; and the plaintiff appealed.

W. A. Gile, for the plaintiff.

F. B. Smith, T. H. Gage, Jr. & W. S. B. Hopkins, for the defendant Smith.

KNOWLTON, J. The power of sale contained in the mortgage is a power coupled with an interest, and neither the mortgagor nor the equitable owner that he represents can do anything to defeat the right of the mortgagees to foreclose by a sale under the power. The bankruptcy of the mortgagor would not affect the defendant's rights. *Hall v. Bliss*, 118 Mass. 554.

The defendants are not parties to the suit in which the injunction was issued, and their rights are not affected by the injunction.

The admission of the defendant Truesdell, in his answer, does not bind the defendant Smith, who denied in his answer that Truesdell, or Weston, his attorney, who had the mortgage in his possession, objected to the proposed foreclosure, and averred that his action in foreclosing was with the knowledge and approval of Truesdell and Weston. As against Smith, therefore, it was incumbent on the plaintiff to prove his allegations, and the finding of the master against him is conclusive. Moreover, Truesdell in his answer only suggested that for certain reasons the foreclosure ought not to proceed until an account was taken, but at the hearing an agreement was made between the parties as to the state of the account, and both defendants agreed that an account was no longer necessary.

The alleged agreement in regard to the stock of the American Palace Car Company of Maine was immaterial, and the master rightly excluded the evidence of it. The plaintiff's exceptions to the report are without merit.

Decree affirmed.

FRED D. KELLOGG vs. E. C. SMITH & another.

Franklin. September 17, 1901. — October 18, 1901.

Present: HOLMES, C. J., KNOWLTON, LATHROP, & BARKER, JJ.

Negligence, On railroad, Contributory.

A railroad train after stopping at a station backed from the station for the purpose of switching the rear cars upon another track, and stopped. The plaintiff was a passenger and wished to pass through the train to the rear car. Finding one of the cars crowded, he stepped off the platform of the car intending to go to the rear of the train on the outside. It was very dark and he could not see and did not know where he was stepping. The train was on a bridge over a river, and the plaintiff fell through into the water below and was injured. The platform from which the plaintiff stepped was about seven hundred feet from the station. The plaintiff was familiar with the station and the bridge. He knew that the train had backed toward the river, but did not know how far it had backed and underestimated the distance. *Held*, that the plaintiff did not use due care; that he took the chances and must abide the result.

TORT against the receivers of a railroad company for alleged negligence. Writ dated October 1, 1897.

In the Superior Court, *Hardy, J.*, ordered a verdict for the defendants; and the plaintiff alleged exceptions.

D. Malone, for the plaintiff.

C. A. Hight, for the defendants.

HOLMES, C. J. This is an action for personal injuries caused by the plaintiff's falling through a railroad bridge into the water of Miller's River. He had returned from an excursion over the Vermont Central road, and the train had reached Miller's Falls, at which point the plaintiff was to continue his journey over the Fitchburg road. After stopping, the train backed from the station, seemingly with a view to switching the three rear cars across to the Fitchburg road by a spur track which left the Vermont Central track on the station side of Miller's River. While the train was backing from the station toward the river, as the plaintiff knew, the conductor or brakeman said, "The three rear cars for Fitchburg." The plaintiff, who was in the smoking car in front, walked back through that and the next car and reached the platform of the third car, which was one of the three Fitchburg cars although the plaintiff did not know that fact. In the mean

time the train had stopped and the platform on which the plaintiff stood was over the river, about seven hundred feet from the station. The plaintiff seems to have wished to go to the rear car in search of a friend. There were some people standing in the aisle of the car on which he was, which made it slower but by no means impossible for him to pass through the car. It was very dark, the plaintiff could not see and did not know where he was stepping, but stepped off the platform intending to go to the rear of the train on the outside, and fell through the railroad bridge. The plaintiff was familiar with the station and bridge. On these facts the judge directed a verdict for the defendant and the plaintiff excepted.

Without considering other defences, we are of opinion that the jury would not have been warranted in finding that the plaintiff was using due care, and that the direction to the jury was right. The plaintiff knew that the train had backed toward the river, although he underestimated the distance. It was manifest that the notice to take the rear cars for Fitchburg did not call upon passengers to leave the train, even if it had not been given when the train was in motion. The stopping of the train under the circumstances was not an invitation to alight or an assurance to the plaintiff that it was safe to get off. *Buckley v. Old Colony Railroad*, 161 Mass. 26. It is not like those cases where the passenger has reason to suppose that the train has stopped at a station in the regular way. The plaintiff did not know how far the train had backed, but did know that if it backed far enough it would be in the position in which it was. He took the chances and he must abide the result. *England v. Boston & Maine Railroad*, 153 Mass. 490, 493.

Exceptions overruled.

HEMAN OSBORNE & another vs. FRANK D. BARNES
& another.

SAME vs. SAME.

SAME vs. SAME.

Hampshire. September 17, 1901. — October 18, 1901.

Present: HOLMES, C. J., KNOWLTON, LATHROP, & BARKER, JJ.

Mechanic's Lien. Practice, Civil, Appeal.

In a suit to enforce a mechanic's lien, it appeared, that the petitioner had contracted to build a house for a price named, one half to be paid when the shingles and clapboards were on and the other half when the house was finished. *Held*, that the contract did not stipulate for a credit inconsistent with the enforcement of the lien given by the statute and could not be construed as a waiver of it.

In a suit to enforce a mechanic's lien, it appeared, that in the same instrument in writing the petitioner agreed to build three houses one on each of three lots not contiguous, each for a price named. *Held*, that there were three contracts, one in respect to each of the houses, and the fact that they were contained in the same instrument was immaterial to the enforcement of the separate liens which the statute gave for each house.

In a suit to enforce a mechanic's lien, it appeared, that the alleged owner of the land on which the lien was claimed mortgaged it on the same day that he acquired title, but the deed to him bore date a number of days before it was delivered, and the mortgage was not a reconveyance to his grantor and was not shown to have been for the purchase money or to have been a part of the same transaction as his purchase. *Held*, that a finding of fact that the alleged owner's seisin was not instantaneous could not be disturbed.

In a suit to enforce a mechanic's lien, it was assumed, that where an owner of land makes a contract with a builder and then mortgages his land, a subsequent change of plan by agreement between the builder and the owner of the equity cannot authorize the establishment of liens in favor of the builder for an amount in excess of that called for by the contract as it stood when the mortgage was made. In the particular case, it was not shown that the extra charges accrued after the making of the mortgage, so that no error appeared in a finding for the petitioner.

A suit to enforce a mechanic's lien was brought in a district court against the owner of the land on which the lien was claimed and his mortgagee. The District Court ordered the lien established, and the owner appealed but the mortgagee did not. In the Superior Court both the owner and the mortgagee appeared and were represented at the trial and both excepted to the rulings of the judge of that court who ordered the lien established. The points raised involved the rights of the mortgagee. *Held*, in a decision sustaining the lien, that whether the appeal of the owner alone brought up the whole case was immaterial, as all parties had been fully heard.

THREE PETITIONS to enforce mechanic's liens brought by Heman Osborne against Frank D. Barnes, as owner, and the Northampton Co-operative Bank, as mortgagee, George S. Whitbeck intervening in each case, the original petitions filed in the District Court of Hampshire on June 23, 1900, and the intervening petitions on August 14, 1900.

On appeal to the Superior Court the cases were heard by *Maynard, J.*, on an auditor's report. The judge refused the rulings requested by the respondents and made a decree establishing the liens of both Osborne and Whitbeck in each case; and the respondents alleged exceptions. The appeal from the judgment of the District Court of Hampshire was taken only by the respondent Barnes, but both respondents appeared in the Superior Court and both joined in the exceptions to the decree of that court.

The exceptions and the matters to which they relate are stated in the opinion of the court, except the ninth request for a ruling, referred to in the last paragraph of the opinion, which was as follows: "The respondent Barnes asks the court to rule that if the respondent, the Northampton Co-operative Bank, is not properly before this court on appeal, that the record of the case as sent up from the District Court of Hampshire shows no record of any judgment of the District Court affecting its rights as mortgagee."

J. A. Wainwright, for the respondents.

J. Aldrich, for the original petitioner Osborne.

T. M. Connor, for the intervening petitioner Whitbeck.

BARKER, J. These are three separate petitions to establish liens on three separate lots of land, on each of which the petitioner Osborne built in the year 1900 a dwelling house. The houses were built in accordance with a written contract entered into on January 16, 1900, between him and the respondent Barnes, which fixed the compensation to be paid Osborne for building two of the houses at the sum of \$1,500 each, and that to be paid for building the other house at \$1,200. Osborne sublet to the intervening petitioner Whitbeck a certain part of the work of building each house, and Whitbeck not having been paid has intervened in each of the several petitions and has asked to have his lien for labor established upon the lot described in the petition in which he intervenes.

In each of Osborne's petitions his lien has been established upon the lot described in that petition, and Whitbeck's lien has also been established on each lot for the amount due him for labor done on the house on that lot. The cases were heard in the Superior Court by an auditor and afterward tried by a judge of that court without a jury, and are here upon exceptions taken by the respondents Barnes and the Northampton Co-operative Bank to the refusal of the presiding judge to give certain rulings requested at the trial, and also to the decree entered in each case establishing the liens of Osborne and of Whitbeck on each lot.

1. The first contention of the excepting parties is that Osborne's liens cannot be established because the contract between him and Barnes shows that no liens were contemplated by it. There is no foundation for this contention. By the contract Osborne agreed to build the three houses, two for \$1,500 apiece and one for \$1,200, and Barnes agreed to pay for the same \$750 on each of the \$1,500 houses as soon as the shingles and clapboards should be on, and the remaining \$750 on each as soon as each should be finished, and to pay \$600 on the other house as soon as the shingles and clapboards should be on, and the other \$600 when that house should be finished. In *Ellenwood v. Burgess*, 144 Mass. 534, the contract which it was said must be interpreted as a waiver of any lien upon the land called for payment in promissory notes upon four months' time. Here the contract does not stipulate for a credit inconsistent with the enforcement of the lien given by statute, and cannot be construed as a waiver.

2. The second contention is that the contract is an entire one and that three liens cannot be established for work done under it. But the contract was for the erection of three separate houses with a distinct price for each, one house on each lot, the lots not being contiguous. A separate lien for materials and labor on each house is given by statute, and the circumstance that there was but one written instrument is immaterial to the enforcement of the lien. The instrument contains three contracts, one in respect of each of the three houses. This distinguishes the present cases from *Batchelder v. Rand*, 117 Mass. 176, and other cases cited for the respondents, in which two buildings were erected on the same lot under one contract.

3. The next contention is that the mortgages of the Northampton Co-operative Bank have precedence over Osborne's liens. It is conceded that on January 16, 1900, when the contract that Osborne should build the houses for Barnes was made the latter was not the owner of either parcel of land, and that he had only oral agreements for purchase from the owners. Work was begun on the houses by Osborne within a week from the date of the contract and was prosecuted to completion. Barnes acquired title to one lot on March 17, to another on March 21, and to the third on April 4, by a deed dated and acknowledged on March 21. When Barnes acquired title the statute lien attached to his interests in the several lots, and if he had more than a momentary seisin the liens have precedence of the mortgages which he gave after having acquired title. *Saunders v. Bennett*, 159 Mass. 48. Whether he had such title and seisin as to give Osborne's liens precedence over the mortgages which Barnes made after getting title was a question of fact, and in establishing the liens the court below has found in favor of Osborne upon that question of fact as to each lot of land. As to two of the lots there could be no question whatever. Barnes had title to one lot five days and to another two days before he mortgaged them. As to the other lot he conveyed it in mortgage upon the same day that he acquired title; but the deed to himself bore date a number of days before it was delivered, the mortgage was not a reconveyance to his grantor, and is not shown to have been for the purchase money, or to have been a part of the same transaction as his purchase. Under these circumstances the finding for the petitioners upon this branch of the cases cannot be disturbed. See *Batchelder v. Hutchinson*, 161 Mass. 462, 466.

4. It is contended that there was error in establishing Osborne's liens in an amount which covered matters not called for by the original contract. In dealing with this question we assume in favor of the mortgagee that any change of plan agreed to between the builder and the owner of the equity after the making of the mortgages could not authorize the establishment of liens in favor of the builder for an amount in excess of that called for by the contract as it stood when the mortgages were made. But, in the present cases, it is not shown that the extra charges accrued after the making of the mortgages. The find-

ings, being for the petitioner, are not to be held erroneous unless shown to be so by the bill of exceptions.

5. The contention that Osborne did not file a just and true account is sufficiently answered by the finding to the contrary of the auditor and the decree establishing the liens.

6. The considerations already noted show Whitbeck's right to liens for the labor furnished by him under his sub-contract with Osborne. That contract was made on March 20 and work was begun under it on the next day. *Dunklee v. Crane*, 103 Mass. 470. *Batchelder v. Rand*, 117 Mass. 176. We see no error in the course pursued by Whitbeck to establish his liens on the respective lots. Osborne's petitions were pending and he properly intervened in each petition, and the amount due him for labor on each house was ascertained and his lien therefor duly established upon his intervention in each suit. Pub. Sts. c. 191, § 19.

7. Assuming that the appeal of the respondent Barnes brought up the case as to all parties, no harm has been done to either respondent by the refusal of the court to give the ninth ruling requested. Both excepting parties have been fully heard in the Superior Court and here.

Exceptions overruled.

MOSES E. CUSHMAN vs. AVERY R. CUSHMAN.

Hampshire. September 17, 1901. — October 18, 1901.

Present: HOLMES, C. J., KNOWLTON, LATHROP, & BARKER, JJ.

Negligence, Employer's liability: Assumption of risk, Dangerous machinery.

In an action at common law by a workman in a factory against his employer for personal injuries, it appeared, that the plaintiff, a man of great experience and long service in the factory, was injured while attempting in a dim light to remove a belt from a rapidly revolving shaft. There was a safe way of removing the belt which he knew. He was using another way, when the belt caught in a space between the collar and a fixed pulley, and the plaintiff was carried up to the shafting and injured. *Held*, that if the way of removing the belt adopted by the plaintiff was dangerous, the risk was an obvious one which he must have known and chose to incur, and that he could not recover.

In an action at common law by a workman in a factory against his employer for personal injuries, it appeared, that the plaintiff was injured while attempting to remove a belt from a revolving shaft. The plaintiff offered to show, that he told the defendant, that there ought to be a shipper on the belt, to ship it over the loose pulley and to hold it there, and also to show, that the belt would not stay on the loose pulley because there was no shipper to drop into a notch to hold it. The evidence was excluded. *Held*, that the exclusion of the evidence was right, as there was no evidence that the machine ever had a shipper, and the defendant was not bound to change the condition of the machine in this respect.

TORT, at common law, for personal injuries sustained by the plaintiff while in the employ of the defendant. Writ dated August 10, 1900.

The declaration was as follows: "And the plaintiff says that he was in the employ of the defendant as his servant, and that it was the duty of the defendant to furnish him with safe and suitable tools, machinery and appliances for his work, while so in his employ; but the defendant carelessly and negligently failed so to do, but did furnish him with unsafe, defective, and dangerous tools and machinery, whereby, and while himself in the exercise of due care, the plaintiff was hurt and injured." Subsequently the plaintiff was allowed to file an amended count alleging ignorance of the danger, and want of proper instructions.

At the trial in the Superior Court, before *Pierce, J.*, at the close of the plaintiff's evidence, the judge ruled that the action could not be maintained, and directed a verdict for the defendant. To this ruling and to rulings excluding certain evidence, the plaintiff alleged exceptions. The case is stated in the opinion.

W. G. Bassett, (*E. L. Shaw* with him,) for the plaintiff.

W. H. Brooks, (*W. Hamilton* with him,) for the defendant.

LATHROP, J. The machine on which the plaintiff had been working shortly before the accident was known as a trimmer. It had a loose and a fixed pulley, and a belt which communicated power from shafting about eight feet above the floor. On this shafting was a fixed pulley. About four months before the accident the shafting had been lengthened to the left as one faced the machine, and where the old and new shafting came together there was a collar consisting of two pieces of metal fastened together by set screws. The plaintiff testified that he

was there when the change was made, and knew that there was a coupling and a pulley there. It was customary, at the close of work for the day, to take the belt off the shafting; and it was while the plaintiff was engaged in this work, that the belt, which was a little wider than the space between the collar and the fixed pulley above, was caught in this space, and the plaintiff, who was standing on the floor, in some way got his hand caught, and he was carried up to the shafting and his hand and arm were injured.

The plaintiff was a man about sixty-seven years of age. He was not a machinist by trade, but had worked in the mill for forty years, substantially on the same kind of work, — making leather board, and button board since that came in, about twelve years before. During these twelve years he had been a finisher of button board, and this work required the use of calender rolls and the trimming machine. For twelve or thirteen years he was foreman of the shop, but for some years before the accident he had not been foreman, owing to the fact that during this time the defendant's son was acting in that capacity.

It would be difficult to find a case where a man had had more experience than the plaintiff. He had worked for the defendant's father for ten years before the son succeeded him. He had worked for the son thirty years. So far as the running of machinery was concerned, he undoubtedly knew as much as any one, and had no need of any instructions. *Stuart v. West End Street Railway*, 163 Mass. 391, and cases cited. *Ruchinsky v. French*, 168 Mass. 68. *Wilson v. Massachusetts Cotton Mills*, 169 Mass. 67, 71. *Lowcock v. Franklin Paper Co.* 169 Mass. 313. We may dismiss, therefore, the idea that the plaintiff has any ground of recovery based upon the need of instructions.

There is nothing in the case to show any defect in the machine or in the belt. The only point on which the plaintiff relies is that the space between the collar and the fixed pulley was not large enough to admit the belt without danger of its being caught; but he does not rely on this, in the brief of his learned counsel, as a distinct proposition, but only as coupled with the proposition that he should have been warned of the danger. As the question is however presented by the original declaration, we proceed to consider it.

It appears from the plaintiff's testimony, that before the shafting was lengthened, his practice was to get the belt off the fixed pulley on the shafting to the left; that, although there was plenty of room to the right, he continued this practice after the shaft was lengthened; and that, although he used the machine but a few times after the shaft was lengthened, yet he knew all that there was to know about it. He testified as follows: "We never had any trouble with the belt until the day I was hurt. There never was a time before when this belt got bound between the tight pulley and the machine when I had trouble in getting it out." It further appeared that back of the machine was what was called the apron, and that a person standing on the apron could lift the belt, which was slack, from the space between the fixed pulley and the collar, over the collar and on the shaft beyond; and that the reverse of this was always done when the plaintiff sought to put the belt on to the fixed pulley. It also appeared that the shafting was in front of a window, and but four or five feet above the machine. The whole thing was therefore in plain view, and the plaintiff had as much opportunity as any one to see what was there, and to judge whether the thing which he had to do could be done in safety in the way he chose to do it. There was nothing hidden or concealed from his sight, and nothing which he did not know all about. Being a man of experience and intelligence, he was allowed to do his work in his own way. While there was a safe way of removing the belt, he chose another. If this way was dangerous, the danger was an obvious one, about which he must have known as well as any one in the shop. The accident appears to have been caused solely by carelessness on his part in attempting to remove the belt, in a dim light, from a rapidly revolving shaft. *Russell v. Tillotson*, 140 Mass. 201.

Two exceptions were taken to the exclusion of certain evidence offered by the plaintiff, and we proceed to consider them. The plaintiff offered to show that he told the defendant that there ought to be a shipper on the belt, to ship it over to the loose pulley and to hold it there. There was no offer to show when this was said, and the evidence might have been excluded on this ground. The objection to it is however a broader one. There was no evidence that the machine ever had a shipper,

and the defendant was not bound to change the condition of the machine in this respect.

The plaintiff also offered to show that the belt would not stay on the loose pulley because there was no shipper to drop into a notch to hold it. This is disposed of by what we have already said.

Exceptions overruled.

INDEX.

ABATEMENT.

Action against attorney for conspiring to prevent certain money of his client from being taken on execution does not survive, see ACTION, SURVIVAL.

ACTION.

Where new right is created by statute, remedy provided must be pursued, see STATUTE.

ACTION, SURVIVAL.

If an action lies against an attorney at law for conspiring with a client under examination as a poor debtor to prevent, by false testimony of the client, certain money of the client from being taken on execution, such an action does not survive under Pub. Sts. c. 165, § 1, the injury not being "damage done to real or personal estate" within the meaning of that statute. *Jenks v. Hoag*, 583.

AGENCY.

Mutual Rights and Liabilities.

1. A business man employed to perform services, usually performed by a lawyer, in obtaining compensation for property taken by a city under the right of eminent domain, and who at the time he is employed says that he shall charge five per cent upon the amount of money received, is not employed as a broker, and the stipulation fixing his compensation at five per cent, if successful, leaves the compensation to be received by him, if unsuccessful, to be determined by the value of the services rendered. *Miller v. Haskell*, 312.
2. A real estate broker can recover a commission for services in effecting an exchange of lands, if he can show that he was the effective means of bringing about the exchange, although the transaction was completed through another broker and the bargain was modified in unessential terms. *Hall v. Grace*, 400.
3. Where the owner of real estate employs a broker to bring him an offer for the purchase of it without naming a price, there can be no implied

Agency (*continued*).

agreement that the broker is entitled to a reasonable time in which to procure an acceptable offer, and the owner has a right to dismiss the broker at any time. *Cadigan v. Crabtree*, 474.

4. A real estate broker who has not been successful in procuring a customer for his principal is never entitled to recover on a *quantum meruit* for work done. If his work was in fact the efficient and predominating cause of a sale concluded by another, or if the principal is unable or refuses to sell to a customer furnished by the broker in accordance with the terms of the offer, the broker is entitled to his commission; otherwise, to nothing at all. *Ibid*.
5. In an action by a real estate broker to recover a commission, it appeared, that the plaintiff was employed by the defendant, to procure a lessee for a certain hotel, and knowing the terms then acceptable to the defendant the plaintiff conducted negotiations with G. and P. on the matter, satisfying himself that they were willing to comply with the defendant's terms but getting no offer from them. The defendant then changed his mind and said he had decided not to let the hotel. Thereupon the plaintiff told the defendant that G. and P. were ready to take the hotel on the terms hitherto asked. Later the defendant dismissed the plaintiff and employed another broker who let the hotel to G. and P. substantially on the terms previously named. The jury were instructed, that if at the time the defendant changed his mind the plaintiff had gone so far in his negotiations with G. and P. that they had agreed to take a lease of the hotel on the terms named, and the defendant on being told of this had declined to let the hotel and afterwards had made substantially the same trade with G. and P. through another broker, the plaintiff could recover his commission. *Held*, that, if there had been any evidence to go to the jury that G. and P. had agreed to take a lease of the hotel on the terms named, there would have been no error in these instructions, but, there being no such evidence, an exception to the instructions was sustained. On the evidence, all that the jury would have been warranted in finding was that G. and P. were believed by the plaintiff to be ready to take the hotel on the terms named but that they never made an offer to that effect. *Whether* the plaintiff under different instructions could have recovered a commission without proving that G. and P. made an offer to take the hotel on the terms named, the court did not decide. *Ibid*.

Liability of treasurer of corporation for misappropriation of funds, see CORPORATION, 3.

Scope of Authority.

6. An architect whose approval is a condition precedent to payments to be made under a building contract has no authority to waive an agreement by the owner as to the terms on which payment shall be made. *Leverone v. Arancio*, 439.
7. In an action against a steamboat company for injuries caused by a steamboat of the defendant coming into collision in a fog with a boat in which the plaintiff was fishing anchored close to the edge of the channel through a certain gut which was part of the steamer's regular course, there was

evidence of a conversation between the plaintiff and a wharfinger of the defendant who was on his way to strike a triangle on a point of land for the purpose of guiding the steamboat in the fog. A man in the boat with the plaintiff testified, that the plaintiff cried out to the wharfinger "Are we all right here?" and that the wharfinger said "Yes." The wharfinger testified, that the plaintiff cried out "Do you think they can see us?" and that he replied "that he thought they could, but they would n't expect anybody anchored right in the Gut." *Held*, that, whatever the conversation was, there was nothing in it which could bind the defendant, there being nothing to show that the wharfinger could give any authority to any one to anchor in the path of the approaching steamboat, or that the plaintiff had a right to rely on the wharfinger's opinion as to whether his boat could be seen. *Chesley v. Nantasket Beach Steamboat Co.* 469.

As to extent of auctioneer's agency for seller, see AUCTION, 1, 2.

Sufficiency of memorandum of contract to sell land signed by agent, see FRAUDS, STATUTE OF, 4.

Scope of authority of agent of foreign fire insurance company, see INSURANCE, 5.

Holder of fund advanced under building loan contract not agent of mortgagee, see ORDER.

Ratification.

8. If an honest contract to build a schoolhouse, made by a town with a contractor who is also one of its building committee and by his vote created the majority which accepted his bid, is voidable on the ground that the agent contracted with himself, the facts, that the circumstances became fully known to the inhabitants and were discussed and voted upon at two special town meetings without any repudiation of the contract, are sufficient to warrant a finding that the town had ratified the act of the committee. *Sylvester v. Webb*, 236.

ALTERATION OF INSTRUMENTS.

1. *Seem*, that under St. 1898, c. 533, § 124, where a loan of money is secured by a note and mortgage, a material alteration of the note without fraud may not cancel the debt or avoid the mortgage. *Jeffrey v. Rosenfeld*, 506.
2. *Seem*, that a bill in equity seeking relief on the ground that an alteration was made in a certain negotiable instrument should describe the alteration, in order that the court may see whether as matter of law it was a material alteration under St. 1898, c. 533, § 125. *Whether*, such defect could be taken advantage of on a general demurrer for want of equity, *quære. Ibid.*
3. Whether § 124 of the negotiable instruments act, St. 1898, c. 533, which is copied from § 64 of the English bills of exchange act, should be construed as the original section probably would be in England, that the effect of a material alteration by whomsoever made would be to avoid the note as to all parties except those consenting to it and subsequent in-

dorsers, or whether the rule in this Commonwealth as laid down in *Drum v. Drum*, 133 Mass. 566, would be applied, that a material alteration of a note by a stranger will not avoid it, *quære*. *Jeffrey v. Rosenfeld*, 506.

Necessary allegations in bill for relief against altered instrument, *see* EQUITY JURISDICTION, 2; ALTERATION OF INSTRUMENTS, 2.

APPEAL.

See PRACTICE, CIVIL, 1, 2.

ARBITRATION.

Submission.

1. The decision in *Miles v. Schmidt*, 168 Mass. 339, that an agreement to submit all disputes to a tribunal constituted by the parties themselves is void, has no application to an agreement of submission to arbitration under Pub. Sts. c. 188. On the contrary, submissions under the statute are favored by the court. *Giles v. Royal Ins. Co.* 261.
2. One having claims against various insurance companies arising from the destruction by fire of a building and its contents may make a valid agreement with all the companies for submission to arbitration under Pub. Sts. c. 188, providing for an award adjusting all the rights of the parties. *Ibid.*
3. A submission to arbitration under Pub. Sts. c. 188 provided, that the award of the arbitrators when filed in the Superior Court should be final, that no appeal therefrom should be taken and that the benefit of any appeal from or revision of the award was expressly waived by the parties. There also was a provision, that the person to whom the award was made might take out execution thereon or might at his election procure a decree in equity for the immediate payment of the sum so awarded. *Semble*, that, if there was any objection to the parties waiving a portion of their rights, their attempting to do so did not make the submission invalid. Moreover, that the provision in regard to waiving an appeal could not be construed to exclude an appeal to the court in case of dishonest dealing or to prevent the arbitrators from presenting a question of law to the court, and that the provision for a decree in equity was at most simply invalid. *Ibid.*

Award.

4. A single award upon two submissions under Pub. Sts. c. 188 is bad. *Giles v. Royal Ins. Co.* 261.
 5. In case of a submission to arbitration under Pub. Sts. c. 188, including claims of one plaintiff against several insurance companies who are parties to the submission, the award should state definitely the requirements imposed upon the various companies, so that a separate judgment for a sum of money may be entered against each defendant found answerable to the plaintiff. *Ibid.*
- Appeal from order or judgment on award must be founded on matter of law apparent upon record, *see* PRACTICE, CIVIL, 1.

ARCHITECT.

Architect has no authority to waive provisions of building contract, see AGENCY, 6 ; CONTRACT, 13.

Extra work ordered by owner recovered for without architect's certificate, see CONTRACT, 14.

ASSIGNMENT.

For Benefit of Creditors.

1. In this Commonwealth the time named in a common law assignment for the benefit of creditors within which creditors may sign is regarded as of the essence of the contract, and the creditors who sign within that time acquire thereby the right to have the property distributed among them. *National Bank of Commerce v. Bailey*, 415.
2. An assignment for the benefit of creditors contained a provision, that no creditor should be deemed a party to it or entitled to the benefit of its provisions who failed to assent in writing to its terms within thirty days from its date, provided, that one who was a creditor at the date of the assignment might become a party after thirty days with the written consent of the assignee. The assignee by a writing indorsed on the assignment extended the time within which creditors might become parties to a period of four months from the date of the instrument. One of the creditors, knowing when the time of signing expired, neglected to sign until after the expiration of the four months and on application to the assignee was refused permission to sign. In a suit in equity brought by this creditor, to have the assignee ordered to give his written consent to the plaintiff's becoming a party to the assignment, a demurrer to the bill was sustained, on the ground that the defendant was justified in refusing his consent. The fact, that the assignment contemplated a *pro rata* distribution among the creditors of the assignor and that the plaintiff was a creditor, was not enough to entitle the plaintiff to relief. The assignment also contemplated that only those creditors who signed it within the required time should become parties to it, and the plaintiff had not become a party in the manner provided. *Ibid.*

Assignee for benefit of creditors may maintain action in his own name, see CONTRACT, 19.

Wife may enforce as equitable assignee contract running originally to her husband, see EQUITY JURISDICTION, 1.

Change of beneficiary of life insurance policy by assignment, see INSURANCE, 7.

Mechanic's lien assignable, see MECHANIC'S LIEN, 2.

Assignment, without novation, of contract by builder, not bar to establishing lien, see MECHANIC'S LIEN, 6.

ATTACHMENT.

Bond to dissolve.

1. A bond to dissolve an attachment on land under Pub. Sts. c. 161, § 66, is not invalidated by a failure properly to describe the land, if the name of the action and the attachment are referred to, the description of the property necessarily appearing in the officer's return. *Berry v. Wasserman*, 537.
2. In a bond to dissolve an attachment, given in 1900, a reference to Pub. Sts. c. 171, § 23, and St. 1888, c. 405, in regard to special judgments in case of proceedings in insolvency, is not inapplicable, for when such bond is given it cannot be known that the bankruptcy act of 1898 will not be repealed before final judgment, and, in case of a repeal, these provisions might be important. *Ibid.*
3. A bond to dissolve an attachment of land of the principal obligor on a writ against a third person was given and accepted without first having an appraisal of the attached property under Pub. Sts. c. 161, § 126. The condition of the bond began as follows: "if the above bounden F. W. shall pay to the plaintiff in said action the amount, if any, that he may recover in the action of *B. v. R. W.*, within thirty days after the final judgment in said action; and after said B. shall establish his title to the land in a writ of entry against said F. W." *Held*, that by providing for the payment of the amount recovered in the final judgment "after said B. shall establish his title to the land in a writ of entry" and by executing the bond without an appraisal of the land the obligor waived the requirement for an ascertainment of the value of the land and substituted the amount of the final judgment for the appraisal, that the subsequent provisions of the bond, taken in connection with the statutes made it necessary to treat the words "within thirty days" in the condition of the bond as contradictory and immaterial, and that the bond would be binding for the payment of the judgment on the establishment by the plaintiff of his title to the land attached in a writ of entry, in accordance with the provisions of Pub. Sts. c. 161, § 126, that being a condition precedent to recovery on the bond, *Ibid.*

AUCTION.

Authority of Auctioneer.

1. Because an auctioneer is the agent of both seller and buyer for the purpose of signing a memorandum of a sale made by him, it does not follow that his agency for the one is coextensive in its nature and duration with that for the other. His agency for the buyer is usually conferred when the bid is accepted and begins with the fall of the hammer. Such an authority must be exercised contemporaneously with the sale. But the auctioneer's agency for the seller is generally more extensive and may cover a time both before and after the sale. When such authority exists and is not revoked, the auctioneer may bind the seller by a memorandum signed within a reasonable time. *White v. Dahlquist Manuf. Co.* 427.

2. At an auction sale of lots of real estate the terms of sale required a "deposit" of \$100 upon each sale. In a suit in equity by a purchaser of two separate properties at the sale, to enforce the contract to convey the lots to him, it appeared, that the defendant had placed the two properties with the auctioneer for sale; that immediately after the auction a memorandum of one of the plaintiff's purchases was given to him by the auctioneer, and the plaintiff gave to the auctioneer his check for \$100, the defendant being present; that the auctioneer told the plaintiff that it would be time enough to bring the \$100 for the other purchase the next day; that the next day the plaintiff brought to the auctioneer his check for \$100 upon his second purchase and received a memorandum of that purchase signed by the auctioneer; and that the auctioneer cashed both checks and obtained the money. *Held*, that a check so given and accepted fairly might be said to be a deposit within the general understanding of the word as used at sales by auction. *Held, also*, that the signing of the memorandum by the auctioneer on the day after the sale was good for the purpose of satisfying the statute of frauds, his agency for the seller still existing. *White v. Dahlquist Manuf. Co.* 427.

Deposit.

As to what is sufficient deposit, see *supra*, 2.

AUDITOR.

1. Auditors' reports are made *prima facie* evidence by Pub. Sts. c. 159, § 51, and are therefore always admissible upon matters embraced in the order of appointment. *Moore v. Dugan*, 153.
 2. The objection that certain evidence contained in an auditor's report was inadmissible is no ground for excluding the report or for striking out those portions of it on a motion made at the trial. *Leverone v. Arancio*, 439.
- Presumption as to auditor's report after oral evidence, see EVIDENCE, 2.

BAILMENT.

The owner of a horse, who has bailed him to another to use for a certain period in return for his board and keeping, cannot refuse to receive back the horse at the termination of the period on the ground that the bailee has injured the horse by want of proper food and care and by over use. *Keih v. De Bussigney*, 255.

Failure by bailee of horse to properly use and feed him does not constitute conversion, see CONVERSION, 1.

Leaving bond with broker, who in owner's presence places it in envelope and seals it, a bailment, see CONVERSION, 3.

Bailee can recover only loss or expense necessarily incurred in terminating bailment, see DAMAGES, 6.

BANKRUPTCY.

Levies and Liens.

1. The effect of section 67f of the United States bankruptcy act of 1898 is not to avoid the levies and liens therein referred to against all the world, but only as against the trustee in bankruptcy and those claiming under him, so that the property may pass to and be distributed by him among the creditors of the bankrupt. *Frazee v. Nelson*, 456.

Unrecorded Bill of Sale.

2. St. 1883, c. 73, provides that an unrecorded mortgage of personal property "shall not be valid against any person other than the parties thereto." By the United States bankruptcy act of 1898 the title to all property which the bankrupt before the filing of the petition "could by any means have transferred or which might have been levied upon and sold under judicial process against him" is vested in the trustee in bankruptcy. Under these statutes the holder of an unrecorded bill of sale from a bankrupt given as security for a loan and purporting to convey machinery which remained in the bankrupt's factory has no title as against the trustee in bankruptcy. *Haskell v. Merrill*, 120.

What constitutes fraudulent concealment, question of fact for jury, see FRAUD, 1, 2.

No presumption that note is intended as payment in case of insolvency of maker before negotiation, see PAYMENT.

Pledge or mortgage of chattels by unrecorded bill of sale without delivery, see PLEDGE.

BILLS AND NOTES.

That material alteration of note secured by mortgage may not cancel debt or avoid mortgage, see ALTERATION OF INSTRUMENTS, 1.

As to construction of § 124 of negotiable instruments act, St. 1898, c. 533, relating to material alterations, see ALTERATION OF INSTRUMENTS, 3.

Presumption that note is given as payment may be rebutted, see PAYMENT.

Right of stoppage *in transitu* not lost by accepting purchaser's note, see SALE, 3.

BOARD OF HEALTH.

1. St. 1897, c. 510, does not give the State board of health exclusive jurisdiction of nuisances affecting the purity of the sources of water supply. There is nothing in that statute which takes away or limits the power of local boards of health to deal with nuisances in their respective jurisdictions. *Stone v. Heath*, 385.
2. Under Pub. Sts. c. 80, § 20, giving town boards of health the power to examine into, destroy, remove or prevent "all nuisances, sources of filth, and causes of sickness" within the town, those boards have jurisdiction over nuisances affecting the purity of the water supply as well as other causes of sickness. *Ibid.*

3. The jurisdiction over nuisances given to town boards of health by Pub. Sta. c. 80, §§ 20-27, is summary in its nature, and the orders made thereunder are not subject to judicial examination and revision at the instance of parties affected by them before they are carried out. After they are carried out, however, the questions whether there was a nuisance, and, if so, whether it was caused or maintained by the parties charged therewith, may be litigated. *Stone v. Heath*, 385.
 4. Where a town board of health adjudged certain deposits on land of the plaintiff to be a nuisance, and the plaintiff's land and deposits thereon of the character complained of lay partly in the town to which the board belonged and partly in an adjoining town, it was held, that the order of the board must be taken as limited in its scope to the town to which the board belonged, and an objection that it was in excess of their jurisdiction was not well founded. *Ibid.*
 5. When a town board of health has adjudged that a nuisance exists, the question what influences or motives may have set the board in motion is immaterial. *Ibid.*
 6. It furnishes no ground for interference with a town board of health, who have adjudged certain deposits on land of the plaintiff to be a nuisance as creating danger of pollution to the water supply of the town, that the action of the board was taken with a view to affecting proceedings in a suit pending in the Superior Court between the plaintiff and the company supplying the town with water. *Ibid.*
- No jurisdiction of Superior Court to restrain town board of health abating nuisance, see SUPERIOR COURT.

BOND.

- As to what is sufficient designation of land in bond to dissolve attachment, see ATTACHMENT, 1.
- Reference to suspended insolvency laws in bond to dissolve attachment, see ATTACHMENT, 2.
- Construction of bond to dissolve attachment on real estate, see ATTACHMENT, 3.
- Effect of judgment in action on bond on petition to vacate judgment, see JUDGMENT, 1.
- Holder of mechanic's lien taking bond to dissolve not estopped to contest validity of bond or interest of party giving it, see MECHANIC'S LIEN, 11, 12.
- Surety on replevin bond can show that defendant in replevin was mere bailee, see REPLEVIN, 1, 2.

BOSTON.

- Plan of, to buy certain land evasion of statute limiting indebtedness, see MUNICIPAL CORPORATIONS, 1.
- Held liable for flooding plaintiff's cellar constructed in violation of law, see NEGLIGENCE, 3.

BOSTON AND MAINE RAILROAD.

Construction of St. 1900, c. 426, authorizing lease of Fitchburg Railroad, see **CORPORATION**, 4, 5.

BROKER.

Business man employed to effect settlement for land taken not employed as broker, see **AGENCY**, 1.

When real estate broker entitled to commission, see **AGENCY**, 2, 5.

No implied agreement that real estate broker is entitled to reasonable time to get acceptance of principal's offer to sell, see **AGENCY**, 3.

Real estate broker failing to procure customer cannot recover on *quantum meruit* for work done, see **AGENCY**, 4.

CARRIER.

One maintaining a passenger elevator in an office building is not a common carrier of passengers within the meaning of Pub. Sts. c. 73, § 6, giving a remedy for the loss of life of a passenger by reason of the negligence of "common carriers of passengers." *Seaver v. Bradley*, 329.

Passenger in street car assumes risk of collision with drunken passenger being properly removed from car by conductor, see **NEGLIGENCE**, 8.

Railroad ticket may be more than symbol of contract between carrier and passenger, see **RAILROAD**, 1.

Right of railroad company to refuse ticket not in condition required by rules, see **RAILROAD**, 2, 3.

CHARITABLE TRUST.

Construction of devise as gift to charity, see **TRUST**, 2.

CHILD.

Statutory legitimation of child by simple fiat, see **LEGITIMACY**.

CIVIL SERVICE ACT.

St. 1896, c. 517, § 5, forbidding the removal or suspension except after hearing of any "veteran holding an office or employment in the public service of any city or town," does not apply to a veteran, certified by the civil service commissioners for employment as a plumber, who is employed by the chief of the repair division of the public buildings department of a city to do plumbing by the job from time to time when plumbing work is needed. *Clark v. Boston*, 409.

COLLATERAL INHERITANCE TAX.

See **TAX**, 13-17.

CONDITION.

Certain requirements in building contract held to be conditions precedent to right of contractor to sue, see **CONTRACT**, 12.

What constitutes violation of restriction on land; waiver of right to enforce, see **EASEMENT**, 3, 4.

CONFLICT OF LAWS.

1. A statute of Virginia legalizing the marriages of colored persons living together as husband and wife on February 27, 1866, provided, that, where the parties had ceased to cohabit before that date, all the children of the woman recognized by the man to be his should be deemed legitimate. Before the date named in the statute a man slave left his slave wife in Virginia and acquired a domicile in Massachusetts. Later he visited Virginia and there recognized as his a child of his slave marriage domiciled there. The father died intestate, domiciled in Massachusetts and leaving property here. *Whether* the Virginia child was entitled to the distributive share of a legitimate child in Massachusetts, or whether in order that the statute should have such extraterritorial effect both parties must have been domiciled in Virginia when the act of recognition was performed, even if the domicile of the child and the bodily presence of the father would be sufficient to make the statute operative in Virginia, *quære*. *Irving v. Ford*, 216.
2. The defendant agreed to convey to the plaintiff for the price of \$8,000 certain land and buildings in Massachusetts, and the contents of the buildings. The contract was made in New York and the deed was to be delivered and the money paid at the office of the defendant's agent there. The defendant was unable to give a good title, but made the contract in good faith being unaware of the defect. By the law of New York the plaintiff could recover in such a case only nominal damages and expenses, while in Massachusetts he could recover his loss of profit. *Held*, that the measure of damages was to be determined by the law of New York where the contract was made and to be performed, and that there was nothing in our procedure or mode of administering remedies to make these damages more or less. *Atwood v. Walker*, 514.

Marriage in this Commonwealth of fugitive slave lawful while he remained here, see **MARRIAGE**, 1.

CONSTITUTIONAL LAW.

Personal Liberty.

1. Assuming, that the constitutional provisions securing personal liberty apply to proceedings for the protection of persons alleged to be insane, and that a law authorizing the appointment of a permanent guardian of an insane person without notice would be void, — St. 1900, c. 845, providing for the appointment of temporary guardians of insane persons without notice is constitutional. Such an appointment is founded on necessity and is limited to the time necessary to determine whether a permanent guardian should be appointed. *Bumpus v. French*, 131.

Eminent Domain.

Whether water rights can be taken by eminent domain without a writing, see *ESTOPPEL*, 4.

Police Power.

2. St. 1889, c. 454, and St. 1894, c. 309, giving damages for sheep killed or injured by dogs, are constitutional. *Johnson v. Griswold*, 580.

Class Legislation.

3. The clause of St. 1888, c. 390, § 57, giving mortgagees of record the right to redeem from a tax sale within two years after actual notice of the sale, is not unconstitutional as class legislation. *Barry v. Lancy*, 112.

Due Process of Law.

4. The statutes of this Commonwealth relating to the assessment of taxes are not unconstitutional because they do not give the party assessed an opportunity to be heard. He has a full opportunity to be heard before the assessing board, if he desires it, before the demand becomes conclusive against him, and that is enough. *Harrington v. Glidden*, 486.

School Expenditures.

5. Article 18 of the Amendments to the Constitution is as follows: "All moneys raised by taxation in the towns and cities for the support of public schools, and all moneys which may be appropriated by the State for the support of common schools, shall be applied to, and expended in, no other schools than those which are conducted according to law, under the order and superintendence of the authorities of the town or city in which the money is to be expended; and such moneys shall never be appropriated to any religious sect for the maintenance, exclusively, of its own school." St. 1898, c. 496, § 3, provides that "Any town of less than five hundred families or householders in which a public high school or a school of corresponding grade is not maintained shall pay for the tuition of any child who resides in said town and who attends the high school of another town or city, provided the approval of such attendance by the school committee of the town in which the child resides is first obtained. If any town in which a public high school or a school of corresponding grade is not maintained neglects or refuses to pay for tuition as provided in this section such town shall be liable therefor to the parent or guardian of the child furnished with such tuition, if the parent or guardian has paid for the same, and otherwise to the town or city furnishing the same, in an action of contract." There is a further provision making the town liable if the school committee refuses its approval of such attendance in a case covered by the statute. *Held*, that the statute is constitutional. The words of the amendment requiring expenditures to be confined to schools "which are conducted according to law, under the order and superintendence of the authorities of the town or city in which the money is to be expended" as applied to this statute mean the town or city in which the school is where the tuition is given and where payment for it is to be made. *Fiske v. Huntington*, 571.

Rule of construction for statutes of limitation, see *LIMITATIONS, STATUTE OF*, 1.

CONTRACT.

What constitutes.

1. The plaintiff, a dealer in nursery stock, wrote to the defendant in England, who had previously filled orders for him, stating that he should want certain rhododendrons and other plants for the coming season, enumerating the sizes of the plants and the number of each size wanted, adding "Kindly inform us by return mail the cost of these plants and we will cable as to filling order." The defendant answered giving the prices of the plants wanted, except of one size of rhododendrons which he could not supply. In this letter the defendant suggested a cable code by which, if the plaintiff should cable the words "Light," "Medium" and "Extra," he would be understood to order respectively three of the sizes of rhododendrons at the prices named in the letter. In reply the plaintiff cabled "Ship as ordered." The defendant made no reply and shipped no goods. The plaintiff procured rhododendrons in this country at higher prices than those named by the defendant, and sued the defendant for failure to ship the rhododendrons named in the defendant's letter. *Held*, that there was no contract, that the message was not equivalent to an order to the defendant to ship such of the rhododendrons mentioned in the plaintiff's letter as the defendant had stated prices for, and there had been no order to which the message "Ship as ordered" might refer, and it naturally might refer to an order by mail on its way or to be sent. *Shady Hill Nursery Co. v. Waterer*, 318.

For case of indivisible offer to sell and acceptance thereof, see *SALE*, 2.

Parties.

2. A binding subscription to pay such sums as a committee appointed by a certain association may require is a contract made with such a committee subsequently appointed. *Martin v. Meles*, 114.
- Agreement not to sell proprietary medicine below certain price enforceable only against parties to agreement, see *EQUITY JURISDICTION*, 3.

Consideration.

3. Comment by HOLMES, C. J., on the fact that the repudiation of the notion, that the subscription of others than the plaintiff might be a consideration for the subscription of the defendant, seems not to have been extended to agreements of creditors to accept a composition. *Martin v. Meles*, 114.
4. The defendants, being leather manufacturers, signed the following agreement which also was signed by nine other leather manufacturers: "We, the undersigned, manufacturers of leather, promise to contribute the sum of \$500 each, and such additional sums as a committee appointed by the Massachusetts Morocco Manufacturers Association may require; in no case shall the committee demand from any manufacturer or firm a total of subscriptions to exceed the sum of \$2,000, such sum to be employed for legal and other expenses under the direction of the committee in defending

Contract (*continued*).

and protecting our interests against any demands or suits growing out of Letters Patent for Chrome Tanning, and in case of suit against any of us the committee shall take charge thereof and apply as much of the fund as may be needed to the expense of the same." The plaintiffs were the committee referred to in the agreement and subscribers to it. They did some work before the agreement and after its execution did more, undertook the defence of suits and levied assessments, which were paid, the defendants paying \$750. Thereafter the defendants' firm was dissolved and went out of business, and the defendants notified the plaintiffs thereof. Later upon a demand for the rest of their subscription the defendants refused to pay it. *Held*, that the committee by signing the agreement promised not only to accept the subscribers' money but to perform the duties named, and that either this promise or the subsequent work of the committee invited by the agreement was a good consideration for the defendants' subscription, the court inclining to the view, that the plaintiffs' promise alone was the consideration, but declaring that, if the acts and not the promise constituted the consideration, the defendants' promise became binding upon the first substantial act done by the committee, and, that the defendants' promise was entire and not a series of promises to pay successive sums upon successive steps by the committee. *Held, also*, on the question of damages, that the defendants did not notify the plaintiffs to stop performance until the defendants' liability had been fixed by a demand under the contract, and, even if such a notice had been given in advance, the plaintiffs would have had the right to go on with this contract where there was a common interest in the performance and where the part done and that which remained to be done appeared to be largely interdependent. *Martin v. Meles*, 114.

Sufficiency of consideration of agreement to return pledged stock, see EQUITY JURISDICTION, 6.

Validity.

5. If one signs a lawful contract in the absence of fraud, duress or imposition he is bound, whatever his voluntary ignorance or involuntary misinterpretation of its words. *Clark v. Boston*, 409.
6. A contract for the building of a schoolhouse, made by a town with a contractor, who is also one of the building committee of the town and by his vote created the majority which accepted his bid, if free from fraud and corruption, is not void as against public policy. *Sylvester v. Webb*, 236.

That such contract if voidable may be ratified, see AGENCY, 8.

Validity of agreement of submission to arbitration under statute, see ARBITRATION, 1-3.

Contract invalid as made in pursuance of ordinance violating city charter, see MUNICIPAL CORPORATIONS, 4.

Agreement by city of Boston to purchase certain land invalid as an evasion of statute limiting indebtedness, see MUNICIPAL CORPORATIONS, 1.

Sale of liquor to one known to be proprietor of bar room in prohibition State not necessarily invalid, see SALE, 1.

Construction.

Of agreement to convey land.

7. In an agreement to convey "a good title" to certain land "free and clear from all mortgage encumbrances, taxes and mechanics liens" the word "taxes" includes a sewer assessment. *Williams v. Monk*, 22.

Of agreement for building loan.

8. A mortgage note read as follows: "For Value Received, I promise to pay to A. B. or order, \$30,500, in three months from this date, with interest to be paid monthly at the rate of one and one-half per centum per month, during the said term, and until the said sum is paid in full." The note was secured by a mortgage on land on which the promisor was about to erect a block of buildings, and the consideration for the note was a written agreement for a building loan whereby the mortgagee agreed to advance to the mortgagor the sum of \$30,500 in specified instalments from time to time as the work on the buildings progressed. The agreement provided that the mortgagee should not in any case be liable to make any of the stipulated payments after foreclosure of the mortgage. The note, mortgage and agreement were all delivered as one transaction about a month after the date of the note. Thereafter advances were made from time to time in accordance with the agreement until the mortgagor made default and the mortgage was foreclosed. *Held*, that the legal effect of the contract was that the mortgagee should have interest upon the full amount of the principal of the note from the date of the note and so long as he was under a legal obligation to furnish the money, whether it was set apart or not, and that this obligation ceased only upon the foreclosure of the mortgage. *Bangs v. Fallon*, 77.

Of agreement to pay for sign.

9. A letter, in which a retail liquor dealer asked a brewing company to erect on the building occupied by him a sign stating it to be the headquarters for the sale of the brewing company's beer, contained the following: "It is, of course, understood that I draw no other domestic lager beer than that brewed by the Rochester Brewing Co. during the period of my present license. I also understand that this sign, as well as all other signs placed on or in the building occupied by me, advertising Rochester beer, remain the property of your company and can be removed by you or them at any time which you may elect. Should you find it necessary at any time, by reason of my not drawing your beer, to remove the special board sign in question, and should objections of any kind be raised by the owners of the building to having said sign torn down, I hereby agree to reimburse you or your company to the amount of the cost of the labor and lumber required in the building of such a sign, and hereby grant you the privilege to obliterate the sign matter by repainting." A postscript added "In reference to my reimbursing your company for the labor and lumber used in the within mentioned sign, I mean to convey the idea that *only* in case I should use the board for new sign or advertising purposes, that you are then to be reimbursed to the extent of its cost as above stated." The

Contract (continued).

sign having been erected, the dealer, after the expiration of his license for that year, ceased to sell Rochester beer and used the signboard to advertise the beer of another company. *Held*, that the dealer's promise to reimburse the brewing company for the cost of the sign was not contingent on his ceasing to sell their beer within the period of his then existing license, and that the labor mentioned was not limited to the labor of carpenters. *Held, also*, that in an action against the dealer on his promise, evidence offered by him, to show that the sign was of benefit to the brewing company and not to him, and that the cost of the sign had been charged off by the company on its account books, rightly was excluded as immaterial. *Rochester Brewing Co. v. Killian*, 158.

Of option of corporation to take its stock at appraised value.

10. The following provision, omitting unessential words, was printed on the back of all the certificates of stock of a certain company: "Should the person to whom this certificate is issued desire to sell any of his shares of stock, he shall cause such shares to be appraised by the directors of this company, which it shall be their duty to do on request, and shall thereupon offer the same to them for the use of the company at such appraised value; and if said directors shall choose to take such shares for the use of the company, such person shall, upon the payment or tender to him of such appraised value thereof, and the dividends due thereon, transfer and assign such share or shares to said company; provided that the said directors shall not be obliged to take such shares at the appraised value aforesaid, unless they shall think it for the interests of the company; and if they shall not, within fifteen days after such shares are offered to them in writing, take the same and pay such person therefor the price at which the same shall have been appraised, such person shall be at liberty to sell and dispose of the same shares to any person whomsoever." One of the original stockholders requested the directors of the company to appraise his shares under the foregoing provision. They refused to do so, whereupon the stockholder sold his shares at auction and sued the company on its alleged contract to have the shares appraised on such request, alleging that by reason of the refusal of the directors to appraise his shares they had sold for much less than their true value. *Held*, on demurrer, that the defendant had not made the agreement alleged, but that the plaintiff had agreed to cause his shares to be appraised by the directors, and, what the declaration alleged had not been done, was the thing that the plaintiff agreed to cause to be done. *Held, also*, that the purpose of the appraisal was to fix the price to be paid for the stock, if the company should elect to take it, and that the stockholder had no right to an appraisal unless the stock was to be taken for the company. *Whiton v. Batchelder & Lincoln Corp.* 169.

Of agreement concerning execution of trust.

11. Six heirs at law and legatees of a certain testator, three of whom were the trustees under his will, made an agreement in writing containing the following: "The amount of income from said Estate which has never yet been paid to us, and which is still remaining in the hands of the Trustees

of said Estate undivided, appears on the books of account of said Estate as 'undivided income account,' and is the property of us individually free and clear of any trust, in equal proportions, to wit one fifth part of said undivided income belonging to each one of us, and forms no part of said Trust Estate and shall not go to the last survivor of us, but shall be paid to each of us upon demand or to our Executors or Administrators; and if any share of said 'undivided income' as aforesaid or any other accrued income shall be paid after the decease of any one of us, it shall carry interest from the day of the death of that one of us, to be paid out of the said trust estate; the share of said G. being applied upon his promissory notes now held by said Trustees agreeably with the terms of an agreement signed by him, dated March 8th, 1872, and now in the hands of said Trustees." Also "that the whole income from said trust estate for the year 1874 and for each and every year subsequent thereto, shall each year be paid over by the said Trustees to the person or persons entitled to receive the same by the terms of said Will"; and "that the trust Estate which shall pass to the last survivor of us shall be, and shall be limited to the capital sum which said Trustees received in trust at the death of said D. H. with the natural increase thereof, but not any income derived therefrom up to the time when the last survivor shall become entitled to the whole of said estate by the terms of said will." In a suit in equity against the trustees, to enforce the trust arising from this agreement, the trustees set up the statute of limitations. *Held*, that the effect of the agreement was not to convert the relation between the plaintiff and the trustees into that of debtor and creditor, but to provide for the execution and carrying out of the trust in accordance with the terms thus established; that the defendants were to continue to hold the property in trust and to account for it as trustees; and consequently that the claim was not barred by the statute of limitations. *Pearson v. Treadwell*, 462.

Of building contract, see *post*, 12, 13, 15, 16.

Of agreement between pledgor of stock and pledgee relating to return of stock pledged, see EQUITY JURISDICTION, 6.

Of order drawn on trustee of certain fund, see ORDER.

Of agreement by Boston to purchase certain land, see MUNICIPAL CORPORATIONS, 1.

Performance and Breach.

Damages after notice by defendant of intended breach, see DAMAGES, 3.

Liability for consequential damages contemplated by both parties to contract, see DAMAGES, 4, 5.

Rescission.

That city having made agreement not to impose sewer assessment in consideration of conveyance of certain land for sewer, could not rescind agreement while still holding the land, see ESTOPPEL, 1.

Right to rescind contract on failure to deliver article ordered, see SALE, 5.

Building Contracts.

12. The specifications of a building contract contained the following provisions: "Before any final estimate shall be allowed by the architect in

Contract (*continued*).

- charge, the contractor will be required to sign a certificate on said estimate that he will accept the same as a settlement in full for all claims against the owner on account of work done under this specification and contract. The contractor shall also sign and duly attest a statement, before final payment is made, that all claims for materials provided or labor performed on this property are paid and satisfied in full, and that there are no claims whatsoever against the owner of this property." *Held*, that the foregoing requirements were conditions precedent which the contractor must fulfil before he could sue on the contract. *Leverone v. Arancio*, 439.
13. A building contract provided, that "the contractor under the direction and to the satisfaction of C., architect, acting for the purposes of this contract as agent of the said owner, shall and will provide all the materials and perform all the work mentioned in the specifications and shown on the drawings." *Held*, that this did not go further than to make the architect the agent of the owner in the matter of deciding whether the work done fulfilled the requirements of the specifications and drawings, and did not give him authority to waive, in behalf of the owner, the terms on which the owner had stipulated that the payments were to be made when the work described had been done to the architect's satisfaction. *Ibid*.
14. A contractor, who has altered a house under a contract requiring the work to be performed to the satisfaction of the architect of the owner, and requiring a certificate of the architect's approval before payment, may recover for items of extra work specially ordered by the owner without the knowledge of the architect, although the architect has given no certificate of approval. *Ibid*.
15. The mason's specifications of a building contract contained the provision, "All needed permits must be obtained from the proper authorities." The construction of a bay window was included under the mason's specifications, and it appeared, that a permit for a bay window would be issued only upon a personal application by the owner of the property. It further appeared, that before the making of the contract the owner had applied twice for such a permit and had failed to obtain one, and that the permit was obtained by him six weeks after the contract was signed. The owner being sued on the contract sought to be allowed in recoupment for damages caused by the work being suspended for six weeks immediately after it was begun on account of the want of the bay window permit and also the amount of \$22 expended by him in finally procuring such a permit. *Held*, that, if by the proper construction of the above provision of the specifications it was made the duty of the plaintiff to obtain the bay window permit, he had not undertaken, by agreeing to perform the work prescribed in the specifications, to insure that the permit would be issued without delay. *Held*, also, that the defendant was not entitled to be allowed the \$22 paid by him, as the provision did not throw upon the plaintiff the duty of obtaining the bay window permit, which had to be obtained on the personal application of the owner. *Quære*, whether the requirement went any further than to provide that no work should be done until a permit had been obtained. *Ibid*.
16. In the performance of specifications for plumbing in a building contract

for altering and putting an additional story upon a four story house in Boston, each story being a separate tenement, the work disclosed the existence of an old kitchen sink waste pipe smaller than the three inch pipe required by law for buildings of the height which this one when altered would be, and which ran where new bay windows were to be constructed. The contractor, at the request of the owner and his architect, put in a new three inch waste pipe in a place not to interfere with the bay windows, and connected the sinks with it. Before this was done, there was a discussion between the parties as to whether the new pipe would be an extra, and the architect with the consent of the defendant gave the plaintiff a written order "to proceed at once and finish plumbing according to contract, and if there is any additional cost for three inch pipe and connections, the same will be allowed." In a suit by the contractor in which he was not allowed to recover on the contract on account of his non-performance of conditions precedent, it was *held*, that the plaintiff was entitled to recover for putting in the new waste pipe and connecting the kitchen sinks with it as extra work outside of the contract. *Held*, also, that the trial judge did not err in leaving to the jury the question whether this plumbing was covered by the contract, as it was not a question of the construction of a contract, but depended upon what plumbing was in the building before the alterations were made, a question of fact for the jury. *Held*, also, that this extra work was covered by the written order, and that extrinsic evidence was competent to identify the "three inch pipe and connections" mentioned in the order. *Leverone v. Arancio*, 439.

Architect no authority to waive provisions of building contract, see AGENCY, 6.
 Recoupment of damages in action for conversion of articles of plumbing, see DAMAGES, 8.

Implied Contract: Common Counts.

17. One cannot be held liable on an implied contract to pay for that which he declined to permit to be done on his account, except that when one refuses to perform an obligation which the law imposes upon him, the law in some cases treats performance by another as performance for him and implies a contract on his part to pay for it. Per KNOWLTON, J. *Keith v. De Bussigny*, 255.
18. In an action on an account annexed to recover for services rendered at the request of the defendant in the settlement of a claim against a city for damages for land taken under the right of eminent domain, if the amount named in the declaration is the amount which it was agreed the plaintiff should receive, if successful in making the settlement, this does not prevent him from recovering the reasonable value of his services although the settlement was not made by him, if on the evidence the jury could have found that he was entitled to be paid for his services if they were not successful. *Miller v. Haskell*, 312.
19. M., having a mechanic's lien upon certain real estate of Y. and no claim against Y. other than the debt secured by the lien, executed an assignment to the plaintiff of all his claims against Y. and all his interest in any suits to enforce such demands. Later M. made a general assignment to

the defendant for the benefit of creditors, informing the defendant of his assignment to the plaintiff. Thereafter Y. paid the amount of the debt secured by the lien to the defendant, and the plaintiff sued the defendant for money had and received. *Held*, that the payment by Y. to the defendant discharged the lien, that the defendant received the money with notice of the plaintiff's claim, and that under St. 1897, c. 402, the plaintiff could recover the amount in an action in his own name for money had and received. *Wiley v. Connelly*, 360.

Business man employed to effect settlement for land taken not employed as broker and may recover fair value of unsuccessful services, see AGENCY, 1.

No implied agreement that real estate broker is entitled to reasonable time in which to get acceptance of principal's offer to sell, see AGENCY, 3.

Real estate broker failing to procure customer for principal not entitled to recover on *quantum meruit* for work done, see AGENCY, 4.

Payee of void note may recover on common counts, see PRACTICE, CIVIL, 6.

Extra work on building ordered by owner recovered for without architect's certificate, see *ante*, 14.

Goods bargained and sold or goods sold and delivered, after acceptance of indivisible offer to sell, see SALE, 2.

CONVERSION.

What constitutes.

1. If one, who takes a horse to keep and board for a certain period, having the use of him as compensation, fails properly to use and feed him, this is not exercising dominion over the horse adverse to the owner, so as to make the bailee liable for a conversion, even if his acts are such as to make him liable for negligence or breach of contract. *Keüh v. De Bussigny*, 255.
2. If the owner of a registered city bond transferable only at the office of the city treasurer, having upon its back an assignment in blank executed and acknowledged by its former owner, intrusts it to another for safe keeping, in a city where a usage exists to treat such bonds thus indorsed and acknowledged as the property of the bearer, and the person to whom it is so intrusted embezzles the bond and pledges it for his own debt, whereby it passes into the hands of a *bona fide* purchaser for value, *semble*, that the person thus intrusting the bond to another cannot recover its value from the *bona fide* purchaser. *Scollans v. Rollins*, 346.
3. The owner of a registered city bond transferable only at the office of the city treasurer, having upon its back an assignment in blank executed and acknowledged by its former owner, handed it to a stock broker, whom he was employing in buying and selling stocks, saying that he should like to leave it with him for safe keeping. The broker went with the bond into the next room where the safe was, and returned in a short time with a large envelope upon which were written the name of the owner of the bond and the words "Private Property." The broker then put the bond into the envelope and also at the owner's request put in an insurance policy, sealed the envelope in the owner's presence and carried it into the vault. Later the broker dishonestly pledged the bond for his own debt,

and it came into the hands of a *bona fide* purchaser for value. *Held*, that there was no evidence of an intrusting of the bond to the broker, but that the transaction resulted in a bailment of a sealed envelope, the broker having no right to open the envelope after he had sealed it in the owner's presence and with his consent; therefore, that the owner was not estopped from asserting his title against the *bona fide* purchaser for value. *HOLMES, C. J.*, not concurring on this point, although delivering the opinion of the court. *Scollans v. Rollins*, 346.

Conversion of funds of corporation by treasurer, see CORPORATION, 3.

Rental value of house during delay caused by conversion of articles of plumbing recoverable, see DAMAGES, 7.

Recompment of damages for conversion of articles of plumbing, see DAMAGES, 8.

Rate of interest recoverable for conversion of four per cent bond, see INTEREST, 1.

CORPORATION.

Capital Stock divided into Shares.

1. A gas company which has issued and received payment for the shares of capital stock authorized by its charter without obtaining the approval of the board of gas and electric light commissioners required by St. 1894, c. 450, is not a corporation "having a capital stock divided into shares" and therefore not liable to the franchise tax imposed by Pub. Sts. c. 13, §§ 38-40. Certificates thus issued are void and the money received for them has been paid without consideration and does not constitute assets of the corporation. *Attorney General v. Mass., etc. Gas Co.* 15.

Officers and Agents.

2. Pub. Sts. c. 106, § 24, providing for officers of corporations holding over until their successors are chosen and qualified, does not prevent the termination of the holding by mutual understanding before a permanent successor is appointed. *Marlborough Association v. Peters*, 61.
3. A treasurer of a corporation is bound to keep the money of the corporation distinct, and, if he appropriates it and makes himself a debtor by wrong instead of an agent, he may be sued by the corporation at once, whether his office continues or not. *Ibid.*

Officer of corporation interrogated under Pub. Sts. c. 167, § 53, required to answer as to matters not within his personal knowledge, see INTERROGATORIES.

Rights of dissenting Stockholders under Statute compelling Purchase.

4. St. 1900, c. 428, ratifying the lease of the road of the Fitchburg Railroad Company to the Boston and Maine Railroad, provided in § 3, that dissenting stockholders of either the lessor or the lessee might file with the clerk of the lessee writings declaring their dissent and that the shares of such dissenting stockholders should be acquired by the lessee, being valued as required by the act. It further provided that "Within thirty days from the filing of any stockholder's dissent, as above provided, the lessee shall file its petition with the supreme judicial court sitting within

Corporation (*continued*).

and for the county of Suffolk, setting forth the material facts and praying that the value of such dissenting stockholder's shares may be determined," and that thereupon after notice the court shall require the dissenting stockholder's certificate of stock to be deposited with the clerk of the court and shall appoint three commissioners to ascertain and report the value of the shares. Under this provision, the lessee filed petitions against certain holders of the preferred stock of the lessor who had filed their written dissent under the above provision, alleging that the respondents or the persons whose shares they held voted for the approval of the lease and were not entitled to the rights of dissenting stockholders, and prayed for a decree that the respondents were not entitled to have their shares purchased by the lessee under the above provisions or, in the alternative, if the respondents were so entitled, that they might be ordered to deposit their certificates and that commissioners might be appointed to appraise the value of their shares for purchase by the lessee. *Held*, that under the provisions of the section above named the court had jurisdiction to declare that the respondents were not entitled to the rights of dissenting stockholders under the act, as well as to grant the alternative relief in case they were so entitled, it being more convenient to allow the petitioner to try all questions in one proceeding than to require it to file a separate additional bill, the petitioner having to proceed within thirty days by the terms of the statute and there not being time to try first the one question and then the other. *Boston & Maine Railroad v. Graham*, 62.

5. St. 1900, c. 426, ratifying the lease of the road of the Fitchburg Railroad Company to the Boston and Maine Railroad, provided in § 3 as follows: "Every stockholder of either the lessor or the lessee shall be deemed to assent to the contract of lease authorized by this act, unless within ninety days from the first day of July in the year nineteen hundred he shall file with the clerk of the lessee a writing declaring his dissent therefrom. . . . The shares of any stockholder dissenting as above specified shall be acquired by the lessee and shall be valued and the value thereof be paid or tendered or deposited to or for the account of such stockholder." *Held*, that this provision did not require the lessee to buy the shares of stockholders who voted for the lease and then after the passage of the statute filed written declarations of dissent. *Ibid*.

Powers of Gloucester Water Supply Company, see GLOUCESTER WATER SUPPLY, 1-3.

Liability for tax on franchise not avoided by omitting to do business or by failure to file certificate required by statute, see TAX, 18.

COSTS.

Double costs imposed for frivolous exceptions, see PRACTICE, CIVIL, 4.

DAMAGES.

For Property taken under Statutory Authority.

1. Upon a petition for damages for land taken to widen a street under the betterment acts, the petitioner cannot show the amount of the betterments

assessed upon his remaining land, the increase in value from the widening having no bearing on the value of the petitioner's land before the taking. *Green v. Everett*, 147.

2. A town is entitled to have allowed as an item of expense incurred by it in carrying out a decree for the abolition of a grade crossing, under St. 1890, c. 428, the value of a portion of its gas and electric light plant taken for a highway under the decree and any resulting damage to the remaining plant, and this right can be enforced by a petition filed by the town in the proceedings in the Superior Court for the abolition of the grade crossing. *Middleborough v. New York, etc. Railroad*, 520.

Agreement of settlement of pending petition for damages for land taken not admissible to show value of land, see MUNICIPAL CORPORATIONS, 2.

In Contract.

3. *Semble*, that, where a defendant has announced his intention of breaking a contract and ordered the plaintiff to stop work under it, in cases where the continuance of the work would be merely a useless enhancement of damages, the plaintiff cannot recover damages occasioned by his continuing work after the order to stop. *Martin v. Meles*, 114.
4. If goods sold and paid for are not delivered, the measure of damages usually is their market value at the time and place at which they should have been delivered, but special circumstances may make the vendee's actual loss greater than the sum given by this common rule. When the special circumstances are known to both parties and each has contracted with reference to them, the party in fault justly may be held to make good to the other whatever damages he has sustained as the reasonable and natural consequences of a breach under the circumstances contemplated by the parties. *Semble*, that a vendor may always avoid such consequential liability by expressly declining to assume it, as in order to hold him his assent must be found from the facts. Whether one who like a common carrier is compelled to render the service for which he contracts would be held to the same liability from his undertaking to do the service with knowledge of the special circumstances and without a protest, *quære*. *Loneragan v. Waldo*, 135.
5. One who agrees to deliver drain pipe to a contractor for use in a ditch already dug, and who is notified that delay in delivery will result in the washing in of the ditch in case of rain, may be found liable for the expense incurred by the contractor in re-digging the ditch, which by reason of delay caused by non-delivery of the pipe had been washed in by rain as anticipated. *Ibid*.
6. The bailee of a horse who has had the use of him for his board and keeping for a certain period, after the wrongful refusal of the owner to receive back the horse at the termination of the period, cannot recover from the owner the amount of the horse's board recovered from the bailee by a livery stable keeper with whom he placed the horse after notifying the owner that he was about to do so at his expense. The bailee can recover only the loss or expense necessarily incurred in ridding himself of the horse in a reasonable way, and he is bound to make such disposition of

Damages (continued).

the horse as will terminate the owner's liability for damages or expenses as soon as he reasonably can. *Keith v. De Bussigney*, 255.

To be determined by law of State where contract was made and to be performed, see CONFLICT OF LAWS, 2.

After notice of intended breach, see CONTRACT, 4.

Surety on replevin bond can show that defendant in replevin was mere bailee, see REPLEVIN, 1, 2.

In Tort.

7. In an action of tort for the conversion of articles of plumbing taken from a house, which is in process of erection for the purpose of letting it to tenants, the plaintiff may recover the rental value of the house during any period of delay which was caused by the acts of the defendant. *Munroe v. Armstrong*, 165.

Assessment of damages for sheep killed or injured by dogs, see DOG, 1, 2.

Materiality of evidence to show damages in action for false representations concerning credit of another, see EVIDENCE, 8.

Rate of interest recoverable for conversion of four per cent bond, see INTEREST, 1.

What damages recoverable in action for seduction of child, see SEDUCTION.

Recoupment.

8. In an action of tort for the conversion of articles of plumbing taken from an unfinished house of the plaintiff by a plumber on the failure of the contractor who employed him, it appeared that, after work upon the house had been abandoned by the contractor, the plaintiff caused the house to be completed, and that \$1,500 of the contract price had not been paid by the plaintiff to the contractor. The defendant offered to show, that all the cost of plumbing work done under the plaintiff's direction after he took possession, including the replacing of the articles removed by the defendant, was paid for out of this \$1,500. The evidence was excluded. The defendant contended that the plaintiff by the application of the \$1,500 to the plumbing had recouped his damage from the contractor and could not recover it again. *Held*, that the evidence rightly was excluded. The \$1,500 belonged to the plaintiff and not to the contractor and its application to one purpose or another was immaterial. *Munroe v. Armstrong*, 165.

DECEIT.

1. For the purpose of supporting an action of deceit refraining from action to the plaintiff's loss in reliance upon the false representations of the defendant in legal effect is acting upon the falsehood. It makes no difference whether a plaintiff has been induced to buy property or to refrain from selling it. *Fotler v. Moseley*, 295.
2. The question whether certain reported sales of the stock of a corporation are fictitious may have an important bearing upon the conduct of a man holding some of the shares and thinking of selling them, and a false representation knowingly made by a broker, that the reported sales were

genuine, which induced such stockholder to retain his shares to his loss instead of selling them, will support an action of deceit, if the jury find that on the facts the representation was material. *Fotler v. Moseley*, 295.

3. Whether the loss suffered by a director of a corporation from his retaining certain shares of the stock of the corporation which he had intended to sell, after a broker falsely and fraudulently had represented to him that certain reported sales of the stock were genuine, is attributable to the fraud, is a question of fact for the jury. *Ibid*.

Materiality of evidence to show damages in action for false representations concerning credit of another, see EVIDENCE, 8.

When oral misrepresentations concerning credit of another are actionable, see FRAUDS, STATUTE OF, 3.

DEED.

1. In 1682 the town of Gloucester voted at a town meeting that "Jacob Davis and others joyninge along with him hath liberty of the streame at the head of the Little River to sett up a saw milne." Held, that by this grant, though without words of inheritance, a fee in the easement passed to the grantees. The rigid rules of construction applicable to modern conveyances are not to be applied to transactions of this kind, which took place soon after the settlement of the country when conveyancing was little understood. For the same reason the easement granted was not limited to damming the waters of the stream for the purpose of running a saw mill. *Gloucester Water Supply Co. v. Gloucester*, 365.
2. In 1860 and thereafter two brothers P. and A. held each one undivided quarter of certain land. J. the son of P. acquired a mortgage on this land. In 1891 P. died leaving his interest to J. Four years later J. produced an unrecorded release from A. to P. dated February 1, 1880, by which he contended that A. had conveyed to P. all his interest in the land. J. recorded this release in 1895, and entered to foreclose his mortgage. In 1896 A. died, and thereafter his heirs brought a bill against J. to redeem from the mortgage. J. set up the release of February 1, 1880, in defence to the bill. The release, after referring to a deed of other land not material, referred to a certain deed from one G. to A., the grantor, dated December 19, 1854, and continued as follows: "Now therefore the said P. did verbally agree to and with A. now of said Everett that if he the said A. would pay one half of the purchase money with all other incidental expenses connected with said parcels, and pay one half the costs of all improvements connected with or on said parcels he would convey to him an undivided half part of his interest in the same, I, the said A., having failed in every particular to perform my part of the conditions to be done and performed by me to entitle me to the same do hereby absolutely release all my right, title and interest in and to said parcels of real estate that I may have acquired in any way whatever, and I do hereby remise, release and quitclaim unto the said P. and his heirs and assigns and do absolve him from all obligations under his promise." There was a deed from G.

to A. dated December 19, 1854, but it did not convey the land in question. The mortgaged land was conveyed by another deed from G. to A. dated June 1, 1854, not named in the release. It appeared, that the recitals in the release were not in accordance with the facts; also, that after the date of the release no change was made in the treatment of the property and that after that date as before A. was treated as the owner of a one quarter interest in the land, for eleven years during which P. lived, and for four years after P.'s death during which P.'s clerk was living, and that in 1891 J. in a letter to certain park commissioners offered to sell the land, stating that he was duly authorized by the owners, P. one quarter interest, A. one quarter interest, and two others mentioned. *Held*, that the release of February 1, 1880, if it ever took effect at all, applied to the land conveyed to A. by the deed of December 19, 1854, and not to the land sought to be redeemed from the mortgage, which was conveyed to him by the deed of June 1, 1854. *Stone v. Stone*, 555.

What constitutes violation of terms of restriction on land, see EASEMENT, 4. Deed under valid tax sale passes new title and seisin from time of conveyance, see TAX, 5.

DEVISE AND LEGACY.

1. A devise to the testator's children gives a vested interest unless the will shows a contrary intention. *Stanwood v. Stanwood*, 223.
2. When by a will real property is given to several persons by name to be shared equally among them, they take as tenants in common, and not as joint tenants or as a class, and if one of them dies before the testator his share lapses and does not go to the survivors, unless they are the heirs at law of the testator. *Ibid*.
3. A testator devised all his real estate to a trustee, for the equal benefit of his five children named who were to receive the net income equally during a certain period, at the termination of which, the trustee was to divide the property held by him under the trust equally among the testator's "said children and their respective heirs and assigns." One of the children died before the testator, and another of them died after the testator but before the time of distribution. *Held*, that the gift was not to the children as a class with right of survivorship, but that the children took a vested interest as tenants in common. Consequently, that the share of the child who died after the testator went to the executor of that child, and that the share of the child who died before the testator lapsed, and was held by the trustee upon a resulting trust for the benefit of the testator's heirs at law. *Ibid*.
4. *Semble*, that a provision in a will, that the trustees thereunder shall have no power to sell any part of certain land devised for a charitable use, would not be construed as an attempt to limit the power of the court to authorize a sale, even if it is possible to limit it and thus make specific land inalienable forever. Per HOLMES, C. J. *Amory v. Attorney General*, 89.
5. A testatrix, having by her will directed that all her real estate, consisting of an estate called Seven Oaks, should be devoted to a certain charitable

use, and that the trustees should have no power to sell any part of Seven Oaks, made in a codicil the following provision : " I hereby cancel everything in my said will, which limits the charitable uses to which my real estate and other property in B. shall be put by the beneficiaries therein named and described ; and I now direct that said beneficiaries may use such estate and the income of the trust fund, for all and any such purposes as shall be approved and sanctioned by the trustees holding for them," and authorized the trustees to lease or sell any portion of the real estate with the assent of the beneficiaries and to use the proceeds " for improvements or other needs of same charity." *Held*, that the above directions in the codicil did not mean that the fund might be used for any purpose, whether charitable or not, which the trustees might approve, but only that it might be used for such charitable uses as they approved, the words " any such purposes " referring back to the words " charitable uses." *Amory v. Attorney General*, 89.

6. A testator left the residue of his estate to his wife " to have and to hold at her free will and disposal during the remainder of her life," and, at her death, left " such portions of the estate as may remain " to his daughter. In an action by the widow of the testator to recover damages for a refusal to purchase from her certain land on the ground that she could not give a good title under her husband's will, it was *held*, that the testator left the plaintiff the disposal of his estate and the determination of how much of it should remain, and therefore that she had at least a power to convey a fee. *Savin v. Cormier*, 420.
7. A will contained this provision : " I do hereby give and bequeath to my legal heirs all my estate of every description with the exclusion of my brother L.'s heirs, and it is my will that they shall have no part or parcel of my estate ; also that part that would legally belong to my brother S. I do hereby order to be held in trust by my said executor and the income to be paid by my said trustee to the said S. yearly, and when in the opinion of my said trustee that the said S. or any of his family need it for their necessary support then my said trustee is at liberty to pay over the whole or any part of the principal as he may deem best." At the time of the testator's death he held three notes against S. the earliest of them dated after the execution of the will. There was nothing to show that when the will was executed S. was indebted to the testator or that it was expected that he would be. *Held*, that, in ascertaining the " part that would legally belong " to S., the word " legally " should not be interpreted in its strict and technical sense, and that the indebtedness of S. to the testator should not be deducted. *Bigelow v. Pierce*, 381.
8. A testator died seized of four parcels of land, leaving a widow, one son and one daughter. One half of one parcel of land, on which was his house, he gave to his son when he should arrive at the age of twenty-one years and gave him the remaining half on the death of the testator's widow. He also gave his son another parcel either outright or on the same terms. The remaining two parcels he gave to his daughter when she should arrive at the age of twenty years. Then followed this clause : " My personal estate to be divided in the manner following after my estate

is settled, my wife to have one half, and my two children the remainder in equal shares, if they live to the age of twenty-one years, and if my children should die childless what remains of my estate both real and personal, after the decease of my wife, to descend to the heirs of G. D." Both the son and daughter survived the widow and both died childless after reaching the age of twenty-one years. *Held*, that the contingency intended to be described was the event of the testator's children dying childless before reaching the age of twenty-one years, and that G. D. took nothing. *Donnell v. Newburyport Hospital*, 187.

Execution of power of appointment, see *POWER*, 1, 2.

Exemption of legacies not exceeding \$500 from collateral inheritance tax, see *TAX*, 18.

Future and contingent interests subject to collateral inheritance tax, see *TAX*, 14.

Valuation of future and contingent interests for purposes of collateral inheritance tax, see *TAX*, 15-17.

New trustee under will, appointed by court, has powers of original trustee, see *TRUST*, 1.

Construction of devise as gift to charity, see *TRUST*, 2.

DISCRETION OF COURT.

Sufficiency of identification of rules of railroad company is for presiding judge, see *EVIDENCE*, 12.

Whether witness is qualified as expert is within discretion of presiding judge, see *EVIDENCE*, 25; *RAILROAD*, 6.

DOG.

1. Under St. 1889, c. 454, giving damages for sheep killed or injured by dogs, the return under § 1 of a certificate of damages which contains a slight inaccuracy as to the ownership of the sheep but complies with the essential requirement of an oath as a preliminary to the appraisal, and which contains enough to identify the proceedings and justify the introduction of oral testimony to correct the error as to the title, does not leave the case as if there were no certificate but satisfies the statutory requirement that a certificate shall be returned. *Johnson v. Griswold*, 580.
2. In St. 1889, c. 454, giving damages for sheep killed or injured by dogs, § 1 provides, that when the damages are appraised, the county treasurer shall submit the certificate of damages to the county commissioners, who within thirty days shall examine the bill for damages and make such investigation as they think proper, and issue an order upon the county treasurer for all or any part of the damage. *Held*, that the requirement in regard to the time of the examination is for the benefit of persons claiming damages, and, in the absence of a request by an interested party for an early examination, is only directory, and the failure of the commission-

ers to act within thirty days does not render their subsequent action in favor of an injured party invalid. *Johnson v. Griswold*, 580.

St. 1889, c. 454, and St. 1894, c. 309, giving damages for sheep killed or injured by dogs, constitutional, see CONSTITUTIONAL LAW, 2.

EASEMENT.

1. An easement created by grant is not lost by non-user. *Gloucester Water Supply Co. v. Gloucester*, 365.
2. One owning a raceway crossing the land of another lawfully may remove in a reasonable way all obstructions to the usual flow of the water. *Cobb v. Massachusetts Chemical Co.* 423.

Equitable Restriction.

3. Where a grantor in pursuance of a common scheme imposes restrictions on land sold to various grantees, he can waive his own right to enforce the restrictions but not that of any of his grantees. *Ivarson v. Mulvey*, 141.
4. A restriction on suburban land to continue for eight years only, that no dwelling house placed thereon "shall contain more than two tenants, or be constructed for more than two families," is violated by the construction of a house of three stories containing seventeen rooms available for three families although the owner does not intend to use it for more than two families until the eight year limit of the restriction has expired. *Ibid.*
5. Where an owner divides a tract of land into building lots and as part of a general scheme for its improvement inserts in the deeds of sale restrictions as to the purposes for which the land may be used, if it sufficiently appears that the intent of the grantor was to benefit the lot owners generally, it is not necessary, in order that the restrictions should be enforceable, that they should be exactly the same in all the deeds, if the differences are not substantial. Also, the fact that two of the lots, one sold before the plan was made, and the other a very small one, were sold without restrictions is not inconsistent with a general scheme of the grantor imposing restrictions on the remaining lots. *Bacon v. Sandberg*, 396.
6. It appears to be settled in this Commonwealth, that a plaintiff is not prevented from enforcing in equity a building restriction by the fact that he has not objected to a violation of the restriction by some one in the neighborhood other than the defendant. But, when the plaintiff has violated the restriction himself, the question whether he is entitled to relief depends largely on whether the plaintiff's breach of the restriction was so material and substantial as to enable the court to say that it ought not to interfere in his behalf. *Ibid.*
7. In a suit to enforce an equitable restriction in the deed of the defendant, that no building or structure should be placed within thirteen feet of a certain street, it appeared, that the defendant had put up a one story building the whole of which was within the prohibited thirteen feet, and that the plaintiffs had violated the same restriction in their own deeds by projecting from their respective houses bay windows, piazzas and steps into the

restricted space. *Held*, that, although the plaintiffs could not invoke the aid of a court of equity to prevent the defendant from erecting a piazza, bay window or steps extending into the restricted space, the building of a separate house in this space was something which they had not done, and they were entitled to a decree ordering the defendant to remove the structure thus erected by him. *Bacon v. Sandberg*, 396.

Whether certain acts constitute defence of laches to bill to enforce equitable restriction, see EQUITY JURISDICTION, 8.

Ancient grant of mill privilege without words of inheritance, see DEED, 1.
 Owner of easement in fee not "person having a freehold estate" under St. 1889, c. 442, see INCUMBRANCES; nor owner of a legal estate within meaning of land registration act, see LAND REGISTRATION ACT.
 As to extent of mill privilege, see MILLS, 1, 2.

ELEVATOR.

One operating elevator not common carrier within meaning of Pub. Sta. c. 73, § 6, see CARRIER.

EMINENT DOMAIN.

1. When land is taken for a reservoir "to take and hold water," all water which gathers in the reservoir from springs or by percolation, not flowing in a stream, by necessary implication also is taken. *Gloucester Water Supply Co. v. Gloucester*, 365.
2. A corporation created for the purpose of supplying a city with water was given the right to take water from ponds. The charter contained a provision, that the corporation within a certain time "after the taking of any land or water rights" should file in the registry of deeds "a description of any land so taken" and a further provision, that no application should be made for the assessment of water rights until the water was "actually taken and diverted" by the corporation. The corporation took and diverted the water of a certain pond for less than a year, supplying the city with water therefrom while its principal reservoirs were in process of construction and then abandoned the use of the water of the pond and never resumed it. No description of the water taken was filed in the registry of deeds. *Held*, that, without deciding whether the actual diversion of water would be a legal taking of it within the meaning of the statute authorizing the taking, such a temporary use of the water for less than a year, then abandoned and never resumed, was not a legal taking of the water within the meaning of the act as against a person who had rights in that water and who had not elected to treat it as a taking of it. *Ibid*.

Whether water rights can be taken by eminent domain without a writing, see ESTOPPEL, 4.

EMPLOYERS' LIABILITY.

See NEGLIGENCE, 15-19.

EQUITY JURISDICTION.

Equitable Assignment.

1. A deed was given by an administrator in obedience to a decree of the Probate Court, under Pub. Sta. c. 142, § 4, for the specific performance of an agreement to convey the land. All parties acted in good faith, but the deed was void, because the decree was made without notice to persons interested. The grantee paid the purchase money in accordance with the agreement, occupied the premises for about twelve years with the knowledge of the heirs at law of the grantor's intestate and, without objection from anybody, made substantial repairs and additions and paid the taxes. In a writ of entry brought by one claiming under an heir at law of the grantor's intestate, to recover the premises, it was *held*, that, as an equitable defence under St. 1883, c. 223, § 14, the tenant had a title in the property that would be enforced in equity, being in the position of an equitable assignee of the original contract of sale. *In this case* the original contract of sale ran to the husband of the tenant. *Held*, that the tenant's rights as equitable assignee were not affected by the marital relation. *Nazro v. Long*, 451.

To restrain Foreclosure of Mortgage.

2. A bill in equity, to restrain the foreclosure of a mortgage on the ground, that after the delivery of the mortgage and note there was a material alteration of the note without the plaintiff's assent, contained no allegation of fraud or of fault on the part of the mortgagee, and no allegation that the note or the debt which the mortgage was given to secure had been paid or that there was any tender or offer of payment. *Held*, that the bill did not state a case which entitled the plaintiff to relief in equity. *Jeffrey v. Rosenfeld*, 506.

To restrain Sale below Agreed Price.

3. In a suit in equity by the owner and manufacturer of a proprietary medicine, the trade-mark of which was registered in the patent office of the United States and in the office of the secretary of this Commonwealth, against a retail dealer in drugs and medicines, to restrain him from selling the medicine below a certain price, it appeared, that the medicine was sold by the plaintiff under a written contract by which the purchaser agreed that he would not sell nor allow any one in his employ to sell the medicine at less than a certain price per box, which was a higher price than that at which the defendant was selling it to the public, that the defendant bought the medicine knowing the conditions on which it was sold by the plaintiff, but did not buy it from the plaintiff or from one who purchased it from him. There was nothing to show that the defendant had fraudulently induced or procured the breach of a contract between the plaintiff and any of his vendees. *Held*, that the contracts made with the plaintiff by the original purchasers could be enforced only against them, and that a purchaser had an absolute right to dispose of the property as he pleased. *Garst v. Hall & Lyon Co.* 588.

Continuing Trespass.

4. The defendant, a manufacturing corporation, owned a strip of land eleven feet wide running through the land of the plaintiff and had the right to use it as a raceway for its mill. The defendant in clearing out the raceway widened it to twenty feet or more, thus making an unlawful use of the plaintiff's land which it intended to continue. In a suit in equity seeking an injunction and also an order to the defendant to restore the plaintiff's land to its condition before the trespass, it was *held*, that the plaintiff was entitled to an injunction against such a continuing trespass, but, as the value of the land interfered with was very small and the advantage to the plaintiff of restoring it to its former condition would be very slight, and the expense to the defendant would be much greater than the advantage to the plaintiff, that justice and equity did not require that the defendant should be ordered to restore the land to its former condition, but that the damages suffered by the plaintiff from the acts already done should be assessed, and the defendant be enjoined from further unlawful acts. *Cobb v. Massachusetts Chemical Co.* 423.

Specific Performance.

Of agreement to leave property by will.

5. A woman eighty-five years old offered in writing to give to her sister, seventy years old, all the property she should leave at her decease, if the sister and her daughter would come and stay with her during the remainder of her life. The younger sister accepted the offer and with her daughter came from a distant State and stayed with the older sister until her death thirty-eight hours after their arrival. She died intestate, leaving real estate worth about \$4,000 and personal property worth about \$2,000. In a suit in equity brought by the surviving sister against the administrator of the estate of the deceased sister and the heirs at law of the deceased, it was *held*, that the contract was fair and equal, and, although it could not have been specifically enforced against the plaintiff, was of such a nature that the time for performance by the defendant could not come until the plaintiff's part had been fully performed, that the plaintiff had fully performed her part of the contract, and that, considering the situation of the parties and their relation to each other and the moderate size of the estate, the plaintiff should not be relegated to her rights in an action at law, but was entitled to a decree ordering that the real estate be conveyed to her and that the administrator pay over to her all personal property remaining in his possession after satisfying all claims against the estate. *Howe v. Watson*, 30.

Of oral agreement to redeliver pledged stock.

6. The plaintiff had transferred certain stocks to the defendant, a bank, as security for his note for \$5,000. Thereafter the plaintiff was adjudged an insolvent. The defendant on its own petition was ordered by the Court of Insolvency to sell the securities and apply the proceeds upon the note. Thereupon the plaintiff and defendant made an oral agreement, that the plaintiff should procure some one to purchase certain of the securities for

\$1,000, which sum when paid should be credited upon the note, that the defendant should bid in the remaining securities for \$2,700 in all if no higher bid was made for them and the amount of the bids should be indorsed upon the note, that the defendant should hold and carry the securities thus bid in, and, upon receiving from the plaintiff the amount of its bids with interest, and the balance of the \$5,000 of the note with interest, should convey the securities to the plaintiff. In pursuance of this agreement the plaintiff procured a purchaser who paid \$1,000 for the securities to be sold for that sum, and the defendant delivered those securities and indorsed the payment on the note and on the same day bid in at auction the remaining securities for \$2,700 and indorsed that amount on the note. The defendant proved for the balance of its claim in insolvency and received a dividend. The plaintiff received his discharge. In a bill for a specific enforcement of this contract, by ordering the defendant to deliver the securities to the plaintiff on his paying to the defendant the balance of his indebtedness, it was *held*, that the contract was entire, embodying a single scheme, each part having reference to the others, by which the plaintiff might save his collateral; that, assuming the contract to be within the statute of frauds, the statute was satisfied by the payment of the \$1,000 by the purchaser procured by the plaintiff and the acceptance and receipt by him of the securities thereby purchased; that the plaintiff's agreeing to procure and procuring such purchaser could be found to be a good consideration for the promise of the defendant; and that the contract was one which the court would specifically enforce in spite of there being no mutuality of remedy when the contract was made, as the plaintiff must perform his part of the contract by tendering the balance of his indebtedness before the time for performance by the defendant could arise. *French v. Boston National Bank*, 404.

As to power of Probate Court to decree specific performance against administrator, see PROBATE COURT, 1.

Laches.

7. An executor of a *cestui que trust* seven and a half years after his appointment brought a bill in equity against the trustees to enforce a trust arising from a written agreement in force before his appointment. The delay of the executor appeared to have been principally if not wholly due to a desire on his part to avoid litigation, some of the trustees apparently taking the ground at one time that they were not liable. *Held*, that under such circumstances laches could not be imputed to the executor. *Pearson v. Treadwell*, 462.
8. In a suit to enforce an equitable restriction in the deed of the defendant, as to the place and manner in which he might build upon his lot, it appeared, that the defendant obtained a permit to build on May 9, and that the building was finished about June 10 or 12, that on May 17 a petition was circulated to stop the work and presented to the mayor of the city, that about May 20 one of the plaintiffs had a conversation with the defendant and objected to the building on the ground of restrictions, that on May 27 and June 1 letters complaining of the building were written to

the defendant, that on June 5 or 6 the plaintiffs' attorney had an interview with the defendant in which the defendant said he would let the plaintiffs know in a short time whether he would remove the building or not, that the building was not removed, and on June 14 the bill was filed. *Held*, that there was nothing in these facts to show unreasonable delay on the part of the plaintiffs in bringing their bill, or anything showing either actual consent or passive acquiescence on their part, and that the defence of laches was wholly unsupported. *Bacon v. Sandberg*, 396.

Effect of violation of restriction of land by plaintiff upon his right to enforce it against others, see *EASEMENT*, 6, 7.

For case of relief against special statute of limitation, see *LIMITATIONS*, *STATUTE OF*, 2, 3.

Restrictions imposed in grant of location to street railway enforceable in equity, see *STREET RAILWAY*, 3.

Superior Court no jurisdiction to restrain town board of health abating nuisance, see *SUPERIOR COURT*.

Mortgagee's lien on surplus of proceeds of sale of mortgaged premises for taxes enforceable in equity, see *TAX*, 8, 9.

EQUITY PLEADING AND PRACTICE.

Averments in Bill.

1. Where a bill in equity contains no averment of any fraudulent act or conduct on the part of the defendant, the use of the word "fraudulently" in characterizing his acts, adds nothing to the averments of fact in the bill. *Garst v. Hall & Lyon Co.* 588.

Answer under Chancery Rules.

2. Under the Chancery Rules adopted by this court in 1884 and still in force, all answers, except in case of bills for discovery, are to be treated as pleadings merely and cannot be excepted to for insufficiency. Rules 17 and 18 are to be construed as applying only to bills for discovery. *Pearson v. Treadwell*, 462.

Remedy at Law.

3. The objection to jurisdiction in equity that the plaintiff has an adequate remedy at law cannot first be taken after a master's report has been filed. *Haskell v. Merrill*, 120.

Master's Report.

4. Exceptions to a master's report based on evidence cannot be considered unless the evidence is reported. *Haskell v. Merrill*, 120.
5. Exceptions will not lie to a master's report on the ground that he used the words "loan," "security" and "delivery" in his findings thereby stating conclusions of law from facts. Such words by stating a conclusion allege by implication that facts exist which justify it. If it becomes material to separate the pure facts, the party wishing this can ask for a ruling. *Ibid*.

Construction of Petition.

6. A petition, under St. 1889, c. 442, to determine the nature and extent of the rights of way claimed by the respondents, under a certain deed, in and over a private way called Townsend Place in Boston, alleged, that the petitioners were the owners of certain lots of land situated on Townsend Place with the buildings thereon together with a right of way and of drainage in, upon, and over said Townsend Place as appurtenant to said lands. *Held*, that it was the title to the right of way and not the title to the land of Townsend Place that was intended to be and was the subject of the petition. *Minot v. Cotting*, 325.

Degree of particularity required in bill for relief against special statute of limitation, see LIMITATIONS, STATUTE OF, 2, 3.

Bill for relief on ground that alteration was made in certain negotiable instrument should describe alteration, see ALTERATION OF INSTRUMENTS, 2.

ESTOPPEL.

By Representations.

1. One owning land on the line of a proposed sewer in Boston agreed with the street commissioners and the head of the sewer department that he would convey to the city his land within the lines of a new street where the sewer was to run, in consideration that nothing should be paid for sewer assessments on his adjoining property or for the right to enter the sewer therefrom, and conveyed the land. Subsequently it was voted by the aldermen, with the approval of the mayor, that the assessments for this sewer be assumed by the city on account of the adjoining estates not being benefited by the sewer. A permit to connect the premises with the sewer was issued by the sewer department and the connection was made. A purchaser of this land, on inquiring before his purchase at the collector's office and the sewer department, was informed that there were no assessments or charges against the land. Later this purchaser sued the city for injuries from an overflow of the sewer caused by the alleged negligence of the city. The defence relied upon was that the plaintiff's drain was not lawfully connected, because there was no payment before entering the drain at the rate of two cents per square foot of all land benefited by the connection, as required by the Rev. Ord. of Boston of 1885, c. 27, § 15. *Held*, that, even if for any reason the city had a right to repudiate its bargain, and if the issue of the permit was beyond the power of the sewer department, the city could not repudiate its agreement while still holding the land conveyed to it, and that until he had notice to the contrary the plaintiff had a right to rely on the information which he had received from the city and to assume that he was entitled to protection as one lawfully connected with the sewer. *Hendrie v. Boston*, 59.

By Conduct.

2. In a suit by a woman to enforce against the estate of her deceased sister an agreement of the deceased to leave all her property to the plaintiff, it is

Estoppel (continued).

no bar to the plaintiff's recovery that in ignorance of her rights she accepted payments of money from the administrator as a part of her distributive share of her sister's estate. *Howe v. Watson*, 80.

3. In an action to enforce a contract of the defendant to convey certain land to the plaintiff, it appeared, that the plaintiff visited the office of the defendant's counsel who in the presence of the defendant gave the plaintiff a draft of a deed of the land prepared for execution by the defendant and by his wife as releasing dower, to take to the plaintiff's conveyancer who was to examine the title. Later the plaintiff demanded a deed of the land which the defendant refused. Neither the plaintiff nor his attorney had returned the draft and so far as appeared had retained it in their possession. *Held*, that the plaintiff by his retention of the draft in no way lost his right to require a deed. *White v. Dahlquist Manuf. Co.* 427.
4. Cases holding that the owner of water rights may treat the actual diversion of the water by a municipality or corporation having a statutory right to take water as a legal taking of it, may rest upon the ground that the defendant is estopped to deny that there has been a legal taking, and are not decisive of the question, whether a man can be deprived of his property by an act *in pais* purporting to be done under the right of eminent domain unaccompanied by a writing or other declaration defining the measure of interference with his ownership of the property. *Per LORING, J. Gloucester Water Supply Co. v. Gloucester*, 365.

When owner of non-negotiable security indorsed in blank estopped from asserting title against *bona fide* purchaser, see *CONVERSION*, 2, 3.

Holder of mechanic's lien taking bond to dissolve not estopped to contest validity of bond or interest of party giving it, see *MECHANIC'S LIEN*, 11.

EVERETT.

Powers of city council of, see *MUNICIPAL CORPORATIONS*, 2, 3.

EVIDENCE.

Presumptions and Burden of Proof.

1. The fact, that the demandant in a real action has made out a case sufficient to entitle him to go to the jury, does not throw the burden of proof upon the tenant. *Jaquith v. Rogers*, 192.
2. An auditor's report without changing the burden of proof makes it incumbent upon the other party to go forward with evidence to rebut and control it, but, after evidence has been put in on both sides upon the matters dealt with by the auditor, it would be error to instruct a jury, that there was a presumption of fact that the auditor's report was right. In such a case it is for the jury to consider the evidence anew and to settle for themselves how far they should be influenced by the report. *Wyman v. Whicher*, 276.

Auditor's report is *prima facie* evidence, see *AUDITOR*, 1.

No presumption that common law of Virginia in 1846 gave any effect to slave marriages, see *MARRIAGE*, 2.

Presumption that note is given as payment may be rebutted, see PAYMENT.

Presumption that possession followed conveyance under tax sale, see TAX, 6.

Relevancy and Materiality.

Of checks to show indebtedness.

3. In an action for the conversion of a bond, the defendant introduced evidence for the purpose of showing that the bond was pledged as security by the plaintiff to certain brokers under whom the defendant claimed, and that the plaintiff's account with the brokers at that time was short. The plaintiff testified, that at no time had he been indebted to the brokers and that on one or two occasions during the period in question he lent the brokers money which was repaid by their checks. The plaintiff against the defendant's objection was allowed to put in evidence five checks from the brokers to him dated during the period in question. *Held*, that the checks tended as far as they went to corroborate the plaintiff's case and were admissible as against a merely general objection. *Scollans v. Rollins*, 346.

In action by broker for commission.

4. In an action by a real estate broker to recover a commission for services in effecting an exchange of lands, finally completed by other brokers and with certain changes in the bargain which the plaintiff contended were unessential details, it is proper to exclude evidence, offered by the defendant, as to the particular steps taken and the trouble experienced by the other brokers in carrying out the new features of the modified bargain, with which the plaintiff did not pretend to have anything to do and which he contended were not essential parts of the transaction; even if under any circumstances it would be pertinent, whether the plaintiff could have done the things which were done by the other brokers, and if the trouble of others would have been a criterion of what the plaintiff could have done. *Hall v. Grace*, 400.
5. In an action by a real estate broker to recover a commission for services in effecting an exchange of lands which was finally completed by other brokers, a letter from one of these other brokers to another of them, offered by the defendant as "a part of the history of the transaction which culminated in the sale," may be excluded as immaterial besides being *res inter alios*. *Ibid*.

In action for unlawful arrest.

6. In an action by a passenger against a railroad company for alleged unlawful arrest of the plaintiff on the charge of evading the payment of fare, evidence of the rules of the defendant as to punching tickets and as to allowing passengers to stop over and the use of stop-over checks is admissible. *Dixon v. New England Railroad*, 242.

In action for malicious prosecution.

7. In an action against a pawnbroker for alleged malicious prosecution and causing the unlawful arrest of the plaintiff, it appeared, that the plaintiff represented herself to the defendant as the owner of certain articles which she pledged to him, whereas she held them under a contract of conditional

Evidence (*continued*).

sale, the title being in the vendor, and that the defendant learning of the facts called in a police inspector and informed him of them. The plaintiff offered to show that the defendant held other property of hers more than sufficient to cover all loans which the defendant had made to her and which he had a right to apply to the payment of the loans, and that the defendant did not investigate and report to the officer the state of the general account between him and the plaintiff. *Held*, that the evidence properly was excluded as immaterial, having no bearing whatever upon the pledging of the property of another which was the only thing that the defendant was reporting to the officer. *Held*, also, that evidence to show an offer of the plaintiff to pay the defendant after her discharge from arrest was likewise immaterial, as also was evidence that the plaintiff gave the pawn ticket to the owner of the pledged articles and had no intention of committing a fraud, neither of these facts being known to the defendant at the time he called in the officer. *Burnham v. Collateral Loan Co.* 268.

To show damages in action of deceit.

8. In an action for false representations of the defendant whereby the plaintiff was induced to place \$5,000 in the defendant's hands for investment, it appeared, that the plaintiff intrusted the sum named to the defendant for investment and thereafter received from him certificates purporting to represent shares in an investment association. The plaintiff was allowed to testify that she received \$20 in July, \$100 in October, and \$100 the next January on her investment, and nothing more; also that she had endeavored in every manner to realize on her investment, by way of collection, without success. She was also allowed to testify, that thereafter the defendant advised her to employ a New York lawyer to compel one S. to return to her her money, this evidence being admitted to show an admission by the defendant as to the value of the certificates. *Held*, that, on the question of damages, it was competent for the plaintiff to show what she had paid the defendant and what she had received in return, and that the admission of the defendant was competent on the question of the value of the certificates. *Stannard v. Kingsbury*, 174.

To show fraud against creditors.

9. In a real action to recover land conveyed to the tenant through a third person by her husband, on the ground that the conveyance was fraudulent as against creditors, the demandant asked the tenant's husband "How much were you indebted in 1898 at the time of your examination as a poor debtor?" and stated that his offer was, to show that the witness at the time of the examination referred to had no debts other than the claim of the bank represented by the demandant. *Held*, that the question properly was excluded, the fact sought to be proved having no legitimate bearing on the question in issue. *Jaquith v. Rogers*, 192.

In action on contract to pay for sign, evidence that sign was of benefit to plaintiff immaterial, see CONTRACT, 9.

Amount of betterments assessed upon remaining land immaterial to show value of land taken, see DAMAGES, 1.

Relevancy of certain evidence on trial of complaint for being "lewd, wanton and lascivious person," see LEWDNESS, 2.

Relevancy of certain evidence in rebuttal in action against railroad for fire, see RAILROAD, 6.

Best and Secondary.

10. A writ and an execution and the officer's return thereon, material to show the demandant's title in a real action, may be proved by certified copies without producing the originals. *Frazer v. Nelson*, 456.
11. In this Commonwealth a certified copy from a registry of deeds is sufficient evidence of the execution of the deed of which it is a copy. A copy of a certificate of entry to foreclose comes under the same rule. *Ibid.*
12. Rules of a railroad company in regard to the collection of tickets are not records and are sufficiently identified if it is shown that they were issued by those who conduct the business of the company for the government of its servants. The sufficiency of identification is a question for the presiding judge upon which his finding is conclusive, unless all the evidence is reported and the finding is not warranted by it. *Dixon v. New England Railroad*, 242.

Recital of judgment in execution not best evidence to prove demandant's title claiming under execution sale, see REAL ACTION, 3.

Proof of Foreign Law.

13. What is the law of a foreign State is primarily a question of fact, but, so far as it appears in statutes and decisions which are not conflicting, the construction of the language is for the court. *Cook v. Bartlett*, 576.

Proof of Acknowledgment.

14. By the law of Vermont an instrument of adoption of a child is required to be acknowledged before the judge of probate of the district where it is filed. A certified copy of such an instrument, introduced as evidence of adoption, showed the certificate of acknowledgment to be signed as follows: "Before me, Fred. G. Field, Notary Public" and below and a little to the left "Hugh Henry, Judge of Probate, Dist. of Windsor." The Vermont statute provides, that the instrument shall be recorded, "if it appears to the Probate Court that the provisions of the statute have been complied with." This instrument was recorded. *Held*, that there was nothing in the statute or in the record to give to the signature of the judge of probate any other meaning than that which it should have as evidence that the paper was acknowledged before him as required by the statute, and that the natural inference was that the judge knew that the law had been complied with by an acknowledgment before him. *Cook v. Bartlett*, 576.

Parol and Extrinsic affecting Writings.

15. The words "about thirty-two feet to D.'s land," used in describing a boundary in a deed, are ambiguous and suggest the existence of some monument or abuttal, which extrinsic evidence is admissible to fix. The

Evidence (continued).

practical construction put upon the deed by the parties in treating a certain fence as the boundary is such evidence. *O'Connell v. Cox*, 250.

16. In an action by an actress against the proprietor of a theatre, to recover for the breach of an oral agreement to employ the plaintiff during the fall and winter season of a certain year, the plaintiff was allowed to testify to a conversation with the defendant, which resulted in her signing a written contract for the summer season containing a provision that it might be terminated by either party by two weeks' notice in writing, and also resulted in an oral agreement for the following fall and winter season from which the two weeks' notice clause was by special agreement omitted. *Held*, that the defendant was in no way harmed by the admission of the evidence of the conversation, by which the plaintiff did not seek to vary or control the written contract, but merely to show the circumstances under which the oral agreement was made. *Drake v. Allen*, 197.

Parol evidence admissible to identify certain extra work mentioned in written order, see *CONTRACT*, 16.

Res Gestæ.

17. When a transaction is competent in evidence, declarations which are part of and characterize it are competent for the same purpose for which the transaction itself is competent. *O'Connell v. Cox*, 250.
18. In an action of tort in the nature of trespass *quare clausum*, to determine a disputed boundary, the defendant testified that his deed was delivered to him elsewhere than on the premises, but that a few days before its delivery, he went upon the premises and through the house and yard in company with his grantor who then pointed out to him a fence as a boundary. This was admitted, not as evidence of boundary, but as evidence of seisin of the defendant's grantor. *Held*, that the evidence was competent to prove seisin, the pointing out of the fence as the boundary being part of the *res gestæ*. *Ibid*.

Admissions and Confessions.

19. In a criminal case the defendant's failure to reply to a statement made in his presence concerning a material matter and under such circumstances as to call for a reply or denial, is evidence against him. *Commonwealth v. O'Brien*, 533.
20. One who claimed under a deed of release, wishing to show that it conveyed a certain lot of land belonging to the grantor which was not expressly described in it, testified as follows: "I showed him [the grantor] that release, and asked him what it meant, and he said, 'I don't know.' I said, 'That is your signature.' He said, 'Yes,' and I said, 'You made it out,' and he said, 'Yes, I made it out,' and then said, 'I don't remember about it.'" It appeared, that at this time the grantor seemed to be failing and his memory to be very poor. *Held*, that the evidence did not warrant a finding of a master, that when the deed was shown to the grantor "he did not attempt to repudiate it or deny that it applied to the property" which was the subject of the suit, as there was nothing in the evidence which showed that the question, whether the release applied to the land in dispute, was ever presented to the mind of the grantor. *Stone v. Stone*, 555.

Declarations of Deceased Persons.

21. On an exception to the admission of the declarations of a deceased person under St. 1898, c. 535, if it appears that the declarant was dead at the time of the trial, the admission of the evidence shows that the presiding judge was satisfied that the declarations were made in good faith before the beginning of the suit and upon the personal knowledge of the declarant. *Dixon v. New England Railroad*, 242.
22. In an action by a bank for money lent upon a note held to be void because made by the defendant to her husband, the defendant died between two trials of the case. At the new trial, the administrator of her estate, then the defendant, offered in evidence the declarations made by his intestate after the action was brought, to the effect that she never borrowed any money of the plaintiff. The declarations were offered under St. 1898, c. 445, as in an action against the administrator of a deceased declarant in which the cause of action was supported by oral testimony of a promise or statement made by the deceased person. *Held*, that the declarations were not admissible under St. 1898, c. 445, because it did not appear that the action was supported by oral testimony of a promise or statement made by the intestate. *Whether*, the declarations were admissible under St. 1898, c. 535, was not considered, because they were not so offered. *National Granite Bank v. Tyndale*, 390.

Opinion: Experts.

23. On the issue of the soundness of mind of a testatrix, each of four witnesses was asked whether he or she, during the time mentioned, observed in the testatrix "any peculiarity of manner, speech or conduct." The witnesses answered "No" or "Never." *Held*, that the question did not call for an opinion but for a fact, and was admissible. *Hogan v. Roche*, 510.
24. In an action by a bank for money lent, the cashier of the plaintiff was asked, what transaction took place between the plaintiff and the defendant, and answered "We on December 29th made a loan to" the defendant, and further stated that he personally attended to the transaction. The answer was objected to on the ground that the witness was permitted to state a conclusion in describing the transaction as a loan, and that whether a loan was made was a question solely for the jury. *Held*, that the answer was the statement of a fact within the personal cognizance of the witness, and properly admitted. *National Granite Bank v. Tyndale*, 390.
25. In an action to recover for injuries occasioned by the plaintiff, who had gone into the defendant's shop to purchase furniture, catching her foot in the curled up edge of a worn rubber mat of poor quality, a salesman for fifteen years of the rubber company which supplied the matting in question, who had seen rubber mattings in various stages of wear and part of whose work had been to replace rubber matting that was worn out and who to a certain extent was familiar with the effect of various degrees of wear on rubber mattings, was allowed against objection to testify as to the effect of wear upon such-rubber matting as that in which the plaintiff caught her foot under the conditions assumed to exist in the case. *Held*,

Evidence (continued).

that whether a witness called as an expert has the requisite qualifications and knowledge is largely a matter for the trial judge and his finding thereon will not be interfered with unless it clearly appears to be erroneous, and that under this rule the court could not say that allowing the witness to testify as an expert was erroneous, or that what he testified to was matter of common knowledge. *Toland v. Paine Furniture Co.* 501.

Whether witness qualified as expert question for presiding judge, see RAILROAD, 6.

Discretion of Court.

26. Where a deed was proved by a certified copy from the registry of deeds and a copy of a plan referred to in the deed was permitted to be used at the trial, it was assumed that it was used to show the general locality of the premises, and thus was matter within the discretion of the presiding judge. *Frazee v. Nelson*, 456.

Sufficiency of identification of rules of railroad company for presiding judge, see *ante*, 12.

Whether witness qualified as expert within discretion of presiding judge, see *ante*, 25; RAILROAD, 6.

Res inter alios.

In action by real estate broker to recover commission, see *ante*, 5.

Collateral Issues : Remoteness.

27. In an action to recover for injuries caused by the plaintiff, who had gone into the defendant's shop to purchase furniture, catching her foot in the curled up edge of a worn rubber mat of poor quality, evidence of the condition of the mat four hours after the accident, there being no evidence of any change in the meantime, is admissible to show its condition at the time of the accident. *Toland v. Paine Furniture Co.* 501.

As to objection that auditor's report contains inadmissible evidence, see AUDITOR, 2.

Agreement of settlement of pending petition for damages for land taken not admissible to show value of land, see MUNICIPAL CORPORATION, 2.

Scope of cross-examination, see WITNESS, 1-3.

Assumption as to treatment by trial judge of evidence admissible for one purpose, but inadmissible for another, see WITNESS, 2.

EXCEPTIONS.

See PRACTICE, CIVIL, 7-9.

EXECUTION.

Validity of Levy and Sale.

1. An obvious mistake in an officer's return on a levy of execution does not defeat the levy. *Frazee v. Nelson*, 456.

2. Where all of a debtor's right, title and interest in certain land is sold on execution and a deed is given by the officer to the purchaser at the sale, it need not appear either in the officer's return or in the deed, whether the property sold was free from or subject to incumbrances. *Frazee v. Nelson*, 456.
3. An officer levied an execution on six different parcels of land and afterwards abandoned the levies on all the lots but one, which he sold on execution. He gave no notice before the time of the sale of the abandonment of the liens on the other lots. *Held*, that the failure to give notice of the abandonment was no ground for invalidating the sale, as it could not have operated to the prejudice of the debtor. More bidders rather than fewer would have been present in consequence of the failure to give such notice. *Ibid*.

Notice to Debtor of Sale.

4. Pub. Sts. c. 172, § 46, provides that, in giving notice to a debtor of a sale of his property on execution, if the debtor does not reside within the precinct of the officer serving the execution and is not found by him therein, such officer shall send by mail post-paid a copy of the notice addressed to the debtor at his place of residence as described in the execution. An execution served by a deputy sheriff of Middlesex County described the debtor as having a usual place of business in Boston. The return of the officer showed that he made diligent search for the debtor within his precinct but was unable to find him or that he had any agent or attorney or any abode last and usual or otherwise therein, and that he sent by mail post-paid a notice of the time and place of the sale and a copy of the execution to the debtor addressed to a certain number on a certain street in South Boston, but did not state that the debtor resided at the street and number named. The debtor was present at the time and place appointed for the sale and at the successive adjournments thereof. *Semble*, that if the notice had been addressed to the debtor at Boston, without adding the street and number, it probably would have been good. *Whether*, if so, the addition of the street and number and the part of Boston would invalidate the notice, the court did not consider, as the return could be amended by stating, if that was the fact, that the debtor resided at the street and number in South Boston named. *Frazee v. Nelson*, 456.

Adjournment of Sale.

5. Where an officer's return sets out that a sale on execution was adjourned from time to time by direction of the plaintiff's attorney, the court cannot say that such adjournments were not adjournments for "good cause" within the meaning of Pub. Sts. c. 172, § 30. *Frazee v. Nelson*, 456.

Validity of Deed to Purchaser.

6. A deed to a purchaser at a sale on execution conveying "all the right, title and interest which the said D. had, at the time when the same was attached as aforesaid," is not bad on the ground that it does not appear that there was any attachment, if earlier in the deed the right, title and interest of the debtor in certain land is spoken of as having been seized on execution. *Frazee v. Nelson*, 456.

EXECUTOR AND ADMINISTRATOR.

Admissibility of declarations of deceased declarant under St. 1896, c. 445, in action against administrator, see **EVIDENCE**, 22.

Relief in equity from special statute of limitations, see **LIMITATIONS, STATUTE OF**, 2, 3.

Action against attorney for conspiring to prevent certain money of his client from being taken on execution, does not survive, see **ACTION, SURVIVAL**.

As to power of Probate Court to compel specific performance by administrator of agreement to convey real estate, see **PROBATE COURT**, 1.

FALSE IMPRISONMENT.

One who, believing that crime has been committed, discloses facts to police inspector for investigation, not liable for malicious prosecution, see **MALICIOUS PROSECUTION**.

What may be shown under general denial in action for, see **PLEADING, CIVIL**, 3, 4.

Good faith of officer making arrest may be material, see **PLEADING, CIVIL**, 4.

FENCE.

Fence exceeding six feet in height, maliciously erected, but not on or near division line, not a nuisance, see **NUISANCE**.

FITCHBURG RAILROAD.

Construction of St. 1900, c. 426, authorizing lease of Fitchburg Railroad, see **CORPORATION**, 4, 5.

FIXTURES.

Where, as part of the construction of a new house, articles of plumbing are affixed to the structure by a plumber, under a contract to put in the plumbing, they become a part of the realty and cannot be removed by the plumber on the failure of the contractor who employed him. *Munroe v. Armstrong*, 165.

FLATS.

Construction of deed relating to flats in Mystic River, see **DEED**, 2.

FOREIGN LAWS.

Construction of, by court after proof, see **EVIDENCE**, 13.

FRAUD.

As against Creditors.

1. It is not as a matter of law fraudulent as against a creditor, for the owner of certain land who has no other real estate of sufficient value to satisfy the creditor's claim, but who has other property consisting of stocks,

bonds or money in his possession, to convey the land to his wife without informing the creditor of his ownership of the personal property. The law does not compel him to go to his creditor and tell him just what bonds and securities he has. Whether in such a case there was any fraudulent concealment is a question of fact for the jury. *Jaquith v. Rogers*, 192.

2. In a real action, by a judgment creditor representing a debt established by a suit in Kansas, to recover land conveyed to the tenant through a third person by her husband, on the ground that the conveyance was fraudulent as against creditors, there was evidence, that at the time of the conveyance the grantor had other property worth several times the amount of the claim of the demandant's predecessor in title, that his other indebtedness was small, that some of his property worth several thousand dollars stood recorded in his name, and that the conveyance was made in pursuance of a promise to his wife, given before the bringing of the original suit in Kansas by the demandant's predecessor, at which time the land stood in the grantor's name and could have been attached here, the demandant's predecessor electing to sue in Kansas and to attach the grantor's real estate there. *Held*, that, on this evidence, a request for a ruling that the demandant was entitled to a verdict as a matter of law rightly was refused, the question of fraud being one not of law but of fact for the jury. *Ibid*.

Whether false representations are material; acting upon falsehood; loss attributable to deceit, see DECEIT, 1-3.

Relevancy of certain evidence in real action for land conveyed in fraud of creditors, see EVIDENCE, 9.

FRAUDS, STATUTE OF.

Agreement to leave Property by Will.

1. A letter began: "Dear sister Ellen" and contained the following: "Will you and Minnie come and stay with me as long as I live I will pay all your expenses, and what property I have left will be yours Ellen, my expenses are very large but all that I leave shall be yours." The letter was signed in the name of the person making the offer and the offer was accepted orally by the person addressed who was the only sister Ellen of the writer. In a suit to enforce the contract contained in the letter, it was *held*, that the letter satisfied the requirements of the statute of frauds and of St. 1888, c. 372, requiring an agreement to leave property by will to be in writing, that the description of the person addressed was sufficient, and also the description of the property, as the amount of all the property which the writer should leave at her decease could be made certain. *Howe v. Watson*, 80.

Representations concerning Credit of another.

2. The requirement by Pub. Sts. c. 78, § 4, of a writing, to charge one upon a representation concerning the character or credit of another, applies

Frauds, Statute of (continued).

- only when the purpose of the representation is to enable the person recommended to obtain credit, money or goods. *Stannard v. Kingsbury*, 174.
8. An action can be maintained for oral misrepresentations made by an investment broker concerning the credit of a certain investment association in order to induce the plaintiff to place a sum of money in the defendant's hands for investment. *Ibid.*

Memorandum.

4. In order to satisfy the statute of frauds, a memorandum of a contract for the sale of lands, need not name or describe the vendor, if it is signed by an agent acting for him. *White v. Dahlquist Manuf. Co.* 427.
5. Under Pub. Sts. c. 78, § 1, cl. 4, and § 2, the consideration for the promise sought to be enforced need not be stated in the memorandum, even in the case of a contract for the sale of lands. *Ibid.*
- Auctioneer as agent for seller may bind him by memorandum signed within reasonable time, see AUCTION, 1, 2.

Part Payment : Acceptance and Receipt of Part.

6. A part payment made by a purchaser procured by one of the parties to an oral contract of sale in accordance with the terms of the contract satisfies the statute of frauds as much as if made by one of the parties to the contract. So also of an acceptance and receipt of part of the goods by such purchaser. *French v. Boston National Bank*, 404.

Part payment and acceptance and receipt of part of goods by purchaser not party to contract, see EQUITY JURISDICTION, 6.

FREEHOLD ESTATE.

Owner of easement in fee in private way not "person having a freehold estate" under St. 1889, c. 442, see INCUMBRANCES.

GLOUCESTER WATER SUPPLY.

1. St. 1881, c. 167, created a corporation for the purpose of supplying the city of Gloucester with water. Section 3 required the corporation, after the taking of any land or water rights under the provisions of the act "otherwise than by purchase" to file in the registry of deeds a description of the land so taken. *Held*, that the corporation had the power, recognized as above, to acquire land and water rights by purchase, as an incident to its business of securing and selling water, and that under this power it could purchase and hold a privilege of damming and flooding formerly used by a saw mill, although the running of a mill was beyond its charter powers. *Gloucester Water Supply Co. v. Gloucester*, 365.
2. St. 1895, c. 451, § 16, provided for the purchase by the city of Gloucester from the Gloucester Water Supply Company of all the corporate property rights, privileges, easements, lands, waters, water rights, dams, reservoirs and appliances owned by that company and used in supplying the city with

water. The water company had acquired by deed a mill privilege in a certain stream and a pond created by damming it. It had used the waters of the pond temporarily to supply the city with water while constructing its reservoirs, and had then discontinued the use. It did not own the land under the pond. The city objected to paying for the mill privilege on the grounds, that the waters of the pond were not in actual use when the property of the water company was transferred to the city, that the mill privilege did not give the right to use the pond as a water supply and that the waters of the pond could not so be used without acquiring a fee in the bottom of the pond. *Held*, that the city had the right to acquire the fee in the bottom of the pond, that without acquiring the mill privilege the pond could not be used as a water supply, that the mill privilege was of value as a step towards the ownership of the pond as an auxiliary water supply, and that the mill privilege was the property of the water company owned and used by it within the meaning of the section above named. *Gloucester Water Supply Co. v. Gloucester*, 365.

3. St. 1895, c. 451, an act enabling the city of Gloucester to supply itself and its inhabitants with water, by § 16 made that right conditional on the city's purchasing the property of the Gloucester Water Supply Company, if that company should elect to sell its property to the city, and in that case provided, that "said city shall pay to said company the fair value thereof" and that "such value shall be estimated without enhancement on account of the future earning capacity, or future good will, or on account of the franchise of said company." Commissioners, appointed to value the property under the provisions of the act, excluded evidence of past earnings of the water company, and allowed the sum of \$75,000 in addition to the cost of duplication of the plant less depreciation, in consideration of the fact that the plant was a going concern and in full operation at the time of the transfer. They allowed nothing for the powers of the water company which had never been exercised, to take additional sources of water supply, but considered the existence of such supplementary sources so far as they prevented impairment of the property on the ground that the company's sources shortly might be exhausted. The commissioners found "the fair value" of the property transferred by the company to the city September 24, 1895, "to be the sum of \$600,500, with interest from September 24, 1895." They fixed the amount of costs, including their own fees, and apportioned them between the parties. *Held*, that the evidence of past earnings rightly was excluded. The franchise of the water company was not exclusive, but so long as it had no competitor it was practically in the enjoyment of an exclusive franchise, so that the earnings during this period were not proper evidence of the "fair value" of the property. *Held, also*, that the allowance above the cost of duplication, less depreciation because the corporation was sold as a going concern was justified, and that there was nothing in St. 1895, c. 451, forbidding it. Whether the provisions of the act, excluding future earning capacity and future good will, would allow present earning capacity and present good will to be taken into account or not, the element of value that came from the property being sold as a going concern was not excluded from consid-

eration by the provisions of the act. *Held, also*, that the commissioners rightly allowed nothing for the unused powers of the water company to acquire additional sources of water supply. These rights could be revoked and were in fact revoked by St. 1895, c. 451. *Held, also*, that the commissioners properly could adopt, as a basis of their valuation, the value of the property at the date of its transfer to the city adding interest to the date of payment. *Held, also*, that any objection to the reasonableness of the fees charged by the commissioners must be made before a single justice. *Gloucester Water Supply Co. v. Gloucester*, 365.

Construction of ancient grant of mill privilege by town of Gloucester, see DEED, 1.

Construction of taking of land by Gloucester for reservoir, see EMINENT DOMAIN, 1.

Whether temporary use of water in pond by Gloucester constituted taking, see EMINENT DOMAIN, 2.

GRADE CROSSING ACT.

What may be allowed as an item of expense to town in abolishing grade crossing, see DAMAGES, 2.

GRANT.

Construction of ancient grant of mill privilege by town of Gloucester, see DEED, 1.

GUARDIAN.

St. 1900, c. 845, providing for appointment of temporary guardian of insane person constitutional, see CONSTITUTIONAL LAW, 1; INSANE PERSON.

HIGHWAY.

See WAY.

HUSBAND AND WIFE.

Wife may enforce as equitable assignee contract which ran originally to her husband, see EQUITY JURISDICTION, 1.

INCUMBRANCES.

The owner of an easement in fee in a private way adjoining his land is not a "person having a freehold estate" within the meaning of St. 1889, c. 442, giving such person a remedy to determine the validity, nature or extent of certain incumbrances "when the title to land" appears to be affected. *Minot v. Cotting*, 325.

Construction of petition for determining extent and validity of incumbrances, see EQUITY PLEADING AND PRACTICE, 6.

INSANE PERSON.

Semble, that under St. 1900, c. 345, providing for the appointment of temporary guardians of insane persons, although the appointment may be made without notice, it cannot take effect without the knowledge of the party concerned, who may apply at once to have the decree revoked and is entitled to a hearing if he wants it—a right implied from the nature of the case. *Bumpus v. French*, 131.

St. 1900, c. 345, providing for appointment of temporary guardian of insane person constitutional, see CONSTITUTIONAL LAW, 1.

INSOLVENCY.

The assent of an assignee in insolvency to the maintenance of a suit by the insolvent after his discharge, to enforce a contract to deliver to him certain securities, is sufficiently shown by the assignee acting as counsel for the plaintiff. *French v. Boston National Bank*, 404.

No presumption that note operates as payment in case of insolvency of maker before negotiation, see PAYMENT.

INSURANCE.

Fire.

Mutual insurance company: Validity of assessment.

1. The receiver of an insolvent mutual fire insurance company filed a petition to levy an assessment on policy holders including the defendant, a former policy holder whose policy had expired more than one year but less than two years before he was notified of the assessment. When the petition for an assessment was filed the provision of St. 1894, c. 522, § 48, was in force, that no assessment should be valid against a person who had not been notified thereof within two years after the expiration or cancellation of his policy. While the matter of the assessment was before an auditor, St. 1897, c. 197, § 2 was passed amending this provision by changing the words "two years" to "one year." *Held*, that the change in the limitation could not have been intended to apply to pending assessments and that this assessment could be enforced. *Sanford v. Hampden Paint & Chemical Co.* 10.

Provision prohibiting sale of property.

2. The provision in the standard form of fire insurance policy, that the property shall not be sold without the assent in writing of the company, is violated by a temporary alienation of the property. *Stuart v. Reliance Ins. Co.* 434.
3. Whether the prohibition of the sale of the insured property without the assent in writing of the company in the standard form of fire insurance policy, prescribed by St. 1894, c. 522, § 60, applies to a sale on execution or to a foreclosure sale not within the control of the policy holder or of the company, *quære*. *Ibid.*

Insurance (continued).

4. Assuming that a sale on execution of property insured against fire, and the expiration of the time for redemption, might be a violation of the provision in the standard form of policy, that the property shall not be sold without the assent in writing of the company, there is no violation of the provision so long as there is a right of redemption leaving an insurable interest in the policy holder. *Stuart v. Reliance Ins. Co.* 434.
5. A fire insurance policy in the standard form, containing the usual prohibition of the sale of the property insured without the assent in writing of the company, was made payable in case of loss to a mortgagee named. A creditor of the assured mortgagor sold the property on execution. Thereafter the mortgagee foreclosed and through another conveyed the property back to the assured mortgagor. The insurance company did not assent in writing to the sale on execution or to the foreclosure sale. After the sale on execution and again after the foreclosure sale the assured notified the agent of the insurance company through whom the policy was issued of the respective sales and requested him to notify the company and keep the policy in force. After foreclosure the mortgagee released his interest as mortgagee in the policy, and the agent assented in writing to the release. Thereafter the assured made a new mortgage of the property and the policy was made payable to the new mortgagee. To this the agent assented in writing in behalf of the company. The company was organized in another State and the agent held a certificate as agent of the company issued by the insurance commissioner under St. 1894, c. 522, § 91. In an action on the policy, it was *held*, that, whether the sales were within the prohibition of the policy or not, the circumstances would warrant a jury in finding, that the recognition of the policy thereafter by the agent as a valid and subsisting policy was within the scope of his authority, and that under the statute named the company was bound by it; *also*, that the agent's action well might have been found to have been taken with the knowledge and acquiescence of the company or at least with such notice on its part as required it to exercise its right to avoid the policy within a reasonable time, or to be regarded as having waived it. *Ibid.*

Sworn statement "forthwith rendered."

6. Buildings insured against fire under a policy in the Massachusetts standard form were destroyed by fire on October 3. The sworn statement required to be "forthwith rendered to the company" was mailed to it by the assured on December 8, and was received on December 10 or 12. The assured was a woman whose husband was "somewhat of an invalid." On October 7, she was called to visit a sick grandchild who died on October 9. The severe illness of the child's mother detained her until the latter part of October. She returned to a village near her destroyed home and remained until the day after election in November. She then moved to another State and was ill there for about two weeks. In an action on the policy, it was *held*, that there was no evidence that would warrant a jury in finding that she used due diligence in sending the statement as soon as she reasonably could, which was a condition precedent to recovering on the policy. Assuming that the illness and death of the plaintiff's grand-

child, the illness of her daughter and her own illness excused her from doing anything about preparing and sending the statement during the entire period of each illness, there was nothing to show that she used due diligence to send the statement during the intervals. *Harnden v. Milwaukee Mechanics' Ins. Co.* 164 Mass. 382 explained. *Parker v. Middlesex Mutual Assur. Co.* 528.

Agreement of submission to arbitration of claims arising under insurance policies in several different companies valid, see ARBITRATION, 2.

Life.

Substitution of beneficiary.

7. A life insurance policy, made payable on the death of B. L., the assured, to M., H. and J., contained a provision permitting the substitution of a new beneficiary with the consent of the company, and provided that no such change should be valid unless signed by the president, secretary or treasurer of the company. The following instrument executed by the assured was assented to by the company in letters signed by its secretary: "I hereby transfer, assign and turn over unto A. G., creditor and relative, all my right, title and interest in Policy No. 2032 issued by the A. M. Life Insurance Company on the life of B. L. and all benefit and advantage to be derived therefrom subject to all the conditions of the contract." The assignee was a creditor to a large amount and the nearest relative of B. L., the assured. *Held*, that the assignment with the assent of the company constituted a change of beneficiary and the substitution of a new one. *Atlantic Mutual Life Ins. Co. v. Gannon*, 291.

INTEREST.

1. A plaintiff recovering judgment for the conversion of a four per cent bond is entitled to interest at the rate of six per cent per annum from the date of the writ. *Scollans v. Rollins*, 346.
 2. An agreement among the heirs at law and legatees of a certain estate, that certain income of the estate should be divisible among them upon demand and should not go to the survivor of them, provided, that if any share of such income should be paid after the death of any of them, it should "carry interest from the day of the death of that one of us, to be paid out of the said trust estate." *Held*, that in the absence of any stipulation to the contrary, the rate of interest must be taken to be six per cent per annum as established by law. *Pearson v. Treadwell*, 462.
- Mortgagee liable for interest on surplus proceeds of foreclosure sale, see MORTGAGE, 4.
- Rate of interest in mortgage ascertained by reference to mortgage note, see MORTGAGE, 5.

INTERROGATORIES.

Under Pub. Sts. c. 167, § 53, providing that by interrogatories, if the party to the suit is a corporation, the opposite party may examine the president, treasurer, clerk, or any director or other officer thereof, in the same

manner as if he were a party to the suit, a president so interrogated may be compelled not only to answer as to matters within his personal knowledge but also to inquire of his officers, servants and agents, and to state the information received from them. *Toland v. Paine Furniture Co.* 501.

JOINT TENANTS: TENANTS IN COMMON.

1. By the great weight of authority, every co-tenant is entitled as a matter of right to a partition. Per HAMMOND, J. *O'Brien v. Mahoney*, 200.
2. The general rule is that a tenant in common is entitled to partition as a matter of right, and the facts, that the estate of an ancestor, whose two heirs at law hold as tenants in common, is in course of settlement, that the uncontested charges against the estate exceed the amount of personal property shown by the inventory, and that one of the heirs at law has a pending claim against the estate greater, if sustained in full, than the inventoried value of both the real and personal property of the estate, afford no ground for denying a partition to the other heir at law. *Ibid.*

Devise to several persons by name taking as tenants in common, see DEVISE AND LEGACY, 2, 3.

Writ of partition still may be used in this Commonwealth, see PARTITION.

Jurisdiction of Probate Court of petitions for partition, see PROBATE COURT, 2, 3.

JUDGMENT.

1. In an action on a bond given under St. 1895, c. 234, § 4, upon a petition to vacate a judgment, the judgment against the principal in the absence of fraud or collusion is conclusive evidence of the amount of the judgment debt against both principal and surety. *Law v. O'Regan*, 107.
2. In the case of *Gerrish v. Gary*, 120 Mass. 132, the true boundary on the southeast of the "Penny Ferry lot" in Charlestown, mentioned therein and in this case, was not in issue, and for that reason it may be doubted whether the statement by the court in *Gerrish v. Gary* as to that boundary line is decisive of the rights of the parties to that suit; but, however that may be, neither Amos nor Phineas Stone, whose rights were involved in the present case, was a party to *Gerrish v. Gary* or concluded by the decision therein, if it can be taken as concluding anybody as to the southeasterly boundary line of the "Penny Ferry lot." *Stone v. Stone*, 555.

JURY.

Expression of opinion in charge to jury, see PRACTICE, CIVIL, 3.

Construction of finding of jury, see PRACTICE, CIVIL, 5.

LACHES.

Delay of executor of *cestui que trust* in bringing bill to enforce trust held not to constitute laches, see EQUITY JURISDICTION, 7.

Whether certain acts constitute defence of laches to bill to enforce equitable restriction, see EQUITY JURISDICTION, 8.

LAND REGISTRATION ACT.

Semble, that the provision of the Land Registration Act, St. 1898, c. 562, § 19, that a person claiming "to own the legal estate in fee simple" may apply for registration of his title, does not include one claiming to own an easement in fee simple. *Minot v. Cotting*, 325.

LEGITIMACY.

The statutory legitimization of a child can be brought about without the fact or fiction of a marriage, by a simple fiat. Per HOLMES, C. J. *Irving v. Ford*, 216.

Exterritorial effect of law as to legitimacy of child, see CONFLICT OF LAWS, 1.

LEWDNESS.

1. Where on a complaint, under Pub. Sts. c. 207, § 29, charging the defendant with being a "lewd, wanton and lascivious person in speech and behavior" the proof is confined to the conduct of the defendant on a single occasion, the conduct proved is not the offence but only a ground of inference that the defendant is a person of the kind described, and everything that bears upon the inference to be drawn from his conduct should be admitted. If, therefore, a defendant is shown to have been guilty of lascivious conduct in a room with women, he is entitled to prove that he went to the room with innocent intent. *Commonwealth v. O'Brien*, 533.
2. On the trial of a complaint, under Pub. Sts. c. 207, § 29, against a married man for being a "lewd, wanton and lascivious person," the evidence related to the conduct of the defendant on a single occasion and warranted the inference that he was then practising personal familiarities or having intercourse with a certain woman. *Whether* he should have been allowed to show a judgment of his acquittal upon an indictment for adultery on this same occasion, *quære*. *Ibid*.

LIEN.

Pub. Sts. c. 192, § 24, providing for the enforcement of certain liens by petition, requires a demand in writing to be "delivered to the debtor or left at his usual place of abode, if within this commonwealth, or made by letter addressed to him at his usual place of abode without the commonwealth and deposited in the post-office to be sent to him." On a petition under this statute to enforce a lien for keeping certain horses, it appeared, that the petitioner mailed a demand for the payment of the debt to the respondent at his residence in this Commonwealth and that the respondent received it the next morning. *Held*, that the delivery of the demand was good. The statute contemplates a delivery by the creditor himself or by any one for him, and the paper may be left at the usual place of abode of the respondent by a postal carrier as well as by an officer qualified to serve civil process. The provision for mailing a demand to a debtor without the Commonwealth merely prescribes a convenient method of

making a demand on such a debtor, and does not imply that a demand actually delivered through the post-office is ineffectual if the debtor resides within the Commonwealth. *Blanchard v. Ely*, 586.

See also **MECHANIC'S LIEN**.

LIMITATIONS, STATUTE OF.

Construction.

1. It is the uniform rule of construction for statutes of limitation, that a statute shortening the period for enforcing a liability is not held applicable where the result would be to deprive one of the right to enforce a claim without a reasonable time to act before being barred. Per *HAMMOND, J. Sanford v. Hampden Paint & Chemical Co.* 10.

Relief from Special Limitation.

2. A creditor of the estate of a deceased intestate, who has failed to bring suit on his claim within two years from the time that the administrator of the estate gave bond for the discharge of the trust, is not entitled to relief under Pub. Sts. c. 136, § 10 on the ground that he refrained from bringing suit at the suggestion of the administrator of the estate relying on certain statements made in good faith by the administrator. *Powow River National Bank v. Abbott*, 336.
3. In a bill in equity under Pub. Sts. c. 136, § 10, seeking to enforce a claim against the estate of a deceased person on which suit had not been brought within two years from the time the administrator gave his bond, an allegation, that through mutual mistake of the administrator and the plaintiff a representation of the estate as insolvent was made so late that it was impossible for the plaintiff to present his claim to the commissioners until after the expiration of the two years, is bad, on special demurrer, for failing to allege with sufficient particularity in what the alleged mutual mistake of the plaintiff and the administrator consisted. *Ibid.*

Change in limitation of time for levying assessments on policy holders of mutual fire insurance company, see **INSURANCE**, 1.

Statute of limitations begins to run against tax collector three months after tax committed to collector, see **TAX**, 4.

Whether general statute of limitations applicable to suit by treasurer of Commonwealth for tax on collateral legacies, see **TAX**, 16.

LOWELL.

Validity of ordinance regulating contracts for city printing, see **MUNICIPAL CORPORATIONS**, 4.

MALICIOUS PROSECUTION.

One who, believing that a crime has been committed, sends for a police inspector and fairly and truthfully discloses to him all matters within the speaker's knowledge which he supposes to have a material bearing upon

the question of the innocence or guilt of the person suspected, and leaves it to the officer to act upon his own judgment and responsibility as to whether or not there shall be a criminal prosecution, and does no more, cannot be held answerable in an action for malicious prosecution, in case the officer comes to the wrong conclusion and prosecutes when he ought not to do so. It makes no difference that the person who sends for the officer and gives him the information is in the habit of doing this in similar cases. *Burnham v. Collateral Loan Co.* 268.

MARRIAGE.

1. Before the abolition of slavery a marriage in this Commonwealth of a fugitive slave was lawful while he remained here, whatever effect recapture might have had upon it. Such a marriage continuing after the abolition of slavery is not to be disturbed. *Irving v. Ford*, 216.
2. Whatever may be the presumption as to the common law in this country concerning marriages between free persons, there is no presumption that the common law of Virginia in 1846 gave any effect to a ceremony of marriage between slaves performed by the master of one of them followed by a cohabitation of eight years. *Ibid.*

MASTER AND SERVANT.

See AGENCY; NEGLIGENCE; EMPLOYERS' LIABILITY, 15-19.

MECHANIC'S LIEN.

1. A mechanic's lien under Pub. Sts. c. 191, is created as soon as the labor is performed. The filing of the certificate required by § 6 is not necessary to create the lien. It merely keeps it alive and prevents its dissolution. *Wiley v. Connelly*, 360.
2. A mechanic's lien, under Pub. Sts. c. 191, is assignable and passes with an assignment of the debt which it secures. *Ibid.*
3. In a suit to enforce a mechanic's lien, it appeared, that the petitioner had contracted to build a house for a price named, one half to be paid when the shingles and clapboards were on and the other half when the house was finished. *Held*, that the contract did not stipulate for a credit inconsistent with the enforcement of the lien given by the statute and could not be construed as a waiver of it. *Osborne v. Barnes*, 597.
4. In a suit to enforce a mechanic's lien, it appeared, that in the same instrument in writing the petitioner agreed to build three houses one on each of three lots not contiguous, each for a price named. *Held*, that there were three contracts, one in respect to each of the houses, and the fact that they were contained in the same instrument was immaterial to the enforcement of the separate liens which the statute gave for each house. *Ibid.*

Priority as to Mortgage.

5. In a suit to enforce a mechanic's lien, it was assumed, that where an owner of land makes a contract with a builder and then mortgages his

Mechanic's Lien (continued).

land, a subsequent change of plan by agreement between the builder and the owner of the equity cannot authorize the establishment of liens in favor of the builder for an amount in excess of that called for by the contract as it stood when the mortgage was made. In the particular case, it was not shown that the extra charges accrued after the making of the mortgage, so that no error appeared in a finding for the petitioner. *Osborne v. Barnes*, 597.

Assignment of Contract.

6. On a petition by two petitioners to enforce a mechanic's lien, it appeared, that the labor and materials for which the lien was claimed were performed and furnished under a written contract between a builder, one of the petitioners, and the respondent ; that the work was begun and carried on by the builder up to a certain time, when he assigned his contract to the other petitioner. The assignee employed the builder to complete the contract, and from that date, until work upon the contract ceased, all labor and materials were furnished to the builder by the assignee. *Held*, that the assignment was not a bar to the lien ; that as to the respondent, there being no novation, the builder remained the contractor, and the assignee, in doing or furnishing the work after the assignment, acted under the authority which the contract gave to the builder, so that in effect the builder performed the work, and his lien could be enforced for the benefit of his assignee. *Moore v. Dugan*, 153.

Contract substantially performed.

7. On a petition to enforce a mechanic's lien, it appeared by the findings, that a contract for the erection of a building, made by the petitioner with the owner of the land, had been substantially but not completely performed, and also that extra work had been done in connection with the erection of the building at the request of the owner. A request to enter judgment for the respondent was refused. *Held*, that the refusal was right, there being clearly a lien for the extra work, and, also, that the petitioner might establish his lien for the amount due him in equity and good conscience for the benefit conferred by him on the landowner by placing the structure on the land, that the claim was within the language of Pub. Sts. c. 191, § 1, a debt for labor and materials furnished, and that the provisions of § 2 in regard to a lien for labor alone had no effect upon it. *Moore v. Dugan*, 153.

Instantaneous Seisin.

8. In a suit to enforce a mechanic's lien, it appeared, that the alleged owner of the land on which the lien was claimed mortgaged it on the same day that he acquired title, but the deed to him bore date a number of days before it was delivered, and the mortgage was not a reconveyance to his grantor and was not shown to have been for the purchase money or to have been a part of the same transaction as his purchase. *Held*, that a finding of fact that the alleged owner's seisin was not instantaneous could not be disturbed. *Osborne v. Barnes*, 597.

Issues for Jury.

9. If a respondent to a petition to enforce a mechanic's lien wants further issues presented to the jury, he must ask for them under Pub. Sts. c. 191, § 21, and, having omitted to do so, he cannot object after a finding for the petitioner on each of the issues presented to the jury, that the findings are not sufficient to justify the establishment of the lien. If the issues and the answers thereto do not make out a case, the court will assume that the other necessary facts were conceded or found by the judge. *McAuliffe v. Dyme*, 214.

Parties to Petition.

10. A builder, who had partly constructed a house under a contract, assigned the contract, and the work thereafter was done by the builder for his assignee. A petition to establish a mechanic's lien was filed in the names of and verified and signed by both the builder and the assignee. The respondent took no objection to the form of the petition except by a request made at the trial to order judgment for the respondent. The judge ordered the lien established in the name of the builder. *Held*, that the respondent was not harmed by the fact that the petition was made in both names, that the respondent's relation to the builder was not changed by the assignment, and, if the assignee ought not to have joined in the petition, his joining was no ground for giving a judgment for the respondent. *Moore v. Dugan*, 153.

Bond to dissolve.

11. The holder of a mechanic's lien who takes a bond under Pub. Sts. c. 191, § 42, from one claiming to have an interest in the property on which the lien is to be enforced, is not estopped thereby from denying such interest or contesting the validity of the bond. *Taunton Savings Bank v. Burrell*, 421.
12. W., the owner of land on which there was a mechanic's lien, transferred it through a third person to his wife by a conveyance which was fraudulent and void as against creditors. Thereafter he gave to the mechanic a bond under Pub. Sts. c. 191, § 42, to dissolve the lien, purporting to release the land altogether therefrom. A mortgagee of the land brought a suit in equity against the mechanic to enjoin him from enforcing his lien. W. and his wife had a child. *Held*, that it was unnecessary to decide whether W. when he gave the bond had an interest in the property within the meaning of Pub. Sts. c. 191, § 42; that, if W. had such an interest as entitled him to give a bond under the statute, and if the bond was not invalidated by his attempt to release the land altogether instead of "his interest in such property," as authorized by the statute, the bond in any case could go no further than to release his interest, and the defendant could not be prevented from asserting his lien subject to W.'s tenancy by the curtesy initiate. *Ibid*.

Discharged by payment to assignee for benefit of creditors of lienor, see CONTRACT, 19.

Mechanic's Lien (continued).

Whether appeal from order establishing lien, on petition against landowner and his mortgagee, by owner alone brings up whole case, see PRACTICE, CIVIL, 2.

MILLS.

1. The mill acts give the right to flow but not to excavate land. *Cobb v. Massachusetts Chemical Co.* 423.
2. The ownership of a mill privilege, giving the right to dam a certain stream and flood a certain meadow, does not give the right to withdraw all the water that collects in the pond thus formed and sell it to the inhabitants of a city. *Gloucester Water Supply Co. v. Gloucester*, 365.

Right of owner of raceway crossing land of another to remove obstructions therein, see EASEMENT, 2.

MORTGAGE.

Of Real Estate.

1. The provisions of St. 1888, c. 390, §§ 60-63, in regard to the payment by a mortgagee of a tax unpaid by the mortgagor, cannot operate to deprive a mortgagee of rights arising from the express terms of the mortgage. *Worcester v. Boston*, 41.
2. In a suit in equity against a mortgagee to have the surplus of the proceeds of a foreclosure sale applied to the plaintiff's claim, the mortgagee is entitled to be allowed for counsel fees incurred by him in preventing or removing an injunction to restrain the foreclosure proceedings, this being a reasonably necessary expense of those proceedings. *Bangs v. Fallon*, 77.
3. A mortgagee is entitled to be allowed a fee paid by him to an auctioneer for his services in conducting a foreclosure sale, if it appears that he paid in good faith no more than the usual price for such services, although there is a reasonable probability that by searching among auctioneers he might have found one who would have undertaken to conduct the sale for a smaller compensation. *Ibid.*
4. If a mortgagee, who holds a surplus from the proceeds of a foreclosure sale, keeps no special deposit of the balance in his hands after satisfying his claims, and there is nothing to show that he has not used the money in his business, he is chargeable with interest upon the surplus from the date of the sale when he received it. *Ibid.*
5. A mortgage note provided that interest thereon should be paid monthly at the rate of one and one half per centum per month. The mortgage stated the condition to be the payment of a certain sum of money, "with interest, as expressed in the note hereby secured," without naming any rate of interest. It was contended, that the mortgage stated the rate of interest only by reference to a private unrecorded document and thereby failed to comply with the registration laws, and that no rate of interest being named in the mortgage the rate must be six per cent per annum under Pub. Sts. c. 77, § 3. *Held*, that the mortgage deed gave notice that some interest was to be paid and the rate and times of payment were

stated in the note, and the reference to the note was sufficient to put persons having claims subject to the mortgage upon inquiry. *Bangs v. Fallon*, 77.

St. 1888, c. 390, § 57, giving mortgagee right to redeem from tax sale constitutional, see CONSTITUTIONAL LAW, 3.

Construction of agreement for building loan secured by mortgage, see CONTRACT, 8.

Mechanic's lien as affected by prior mortgage, see MECHANIC'S LIEN, 5.

Holder of tax title not disseised by conveyance under foreclosure sale, see TAX, 7.

"Owner" does not include mortgagee not in possession, see TAX, 8.

Equitable lien of mortgagee on surplus of proceeds of sale of mortgaged premises for taxes, see TAX, 8, 9.

Right of purchaser at foreclosure sale, or his assignee, to redeem from tax sale, see TAX, 11, 12.

Enforcement by mortgagee as claimant in trustee process of lien on surplus of proceeds of tax sale, see TRUSTEE PROCESS.

Of Chattels.

6. A power of sale in a mortgage is a power coupled with an interest, which cannot be revoked by the mortgagor, and is not affected by a decree of a United States court, in a suit to which the mortgagee is not a party, enjoining the mortgagor from transferring any equitable or other interest in the mortgaged property. *Harvey v. Smith*, 592.

Holder of unrecorded bill of sale without delivery, as security, no title against trustee in bankruptcy, see BANKRUPTCY, 2.

Pledge or mortgage of chattels by unrecorded bill of sale without delivery, see PLEDGE.

MUNICIPAL CORPORATIONS.

Limitation of Indebtedness.

1. The city authorities of Boston desired to acquire certain land adjoining land of the city used for a hospital. The price of the land was \$226,000. The borrowing capacity of the city under St. 1885, c. 178, limiting its indebtedness was but little over \$24,000, and it had no money in its treasury available for the purchase of the land. It was arranged with the owners of the land that they should mortgage it to third parties for \$202,000 and the city should buy it subject to the mortgages for \$24,000. The mortgages were to be payable three years after the conveyance to the city, with a privilege to the owners, their grantees and assigns to pay them off before maturity. The city was not to be mentioned in the mortgages and the deeds to the city were to contain the statement, that the city was not to be held liable in any way for the payment of the mortgages or the interest thereon. Upon a petition of more than ten taxable inhabitants of Boston, under St. 1898, c. 490, to enjoin the city from carrying out the transaction, it was held, that the proposed action of the city must be enjoined as an attempted evasion of St. 1885, c. 178, and within its prohibi-

bition; that the transaction was in substance and effect a purchase of the land by the city for the sum of \$226,000 of which it was to pay \$24,000 in cash and the rest in three years with interest, with the privilege of paying sooner, and this notwithstanding the fact that the city could not be sued for the balance of the purchase money, the manner in which the indebtedness was created being immaterial, if the result was to subject the city to a present liability, direct or indirect, which the taxpayers eventually would be called upon to meet. *Browne v. Boston*, 821.

Powers of City Council.

2. Under the charter of Everett, St. 1892, c. 355, the city council has no power to make an agreement of settlement of a pending petition for damages for land taken to widen a street under the betterment acts, where at the time of the taking no agreement was made under St. 1884, c. 226, and therefore a vote of the city council accepting a proposal of such an agreement of settlement is void and cannot be put in evidence by a petitioner for damages to show the value of his land taken for the widening. *Green v. Everett*, 147.
3. Section 23 of the charter of Everett, St. 1892, c. 355, gives the city council of that city the power to lay out and widen streets. *Semble*, that under this power the city council, in taking land to widen a street, could by a vote accepting a proposal in writing make an agreement under St. 1884, c. 226, with the owner of land taken, that the city should abate the betterments to be assessed upon the remainder of such owner's land upon a reduction of his claim for damages for land taken, notwithstanding §§ 21, 26 and 33 of the charter providing, that the city council shall take no part in the executive business of the city, that all the executive powers of the city shall be vested in the mayor, and that no liability shall be incurred by or in behalf of the city until the city council has voted an appropriation sufficient to meet it. These provisions were passed *alio intuitu* and do not limit the powers of the city council to lay out, alter or widen ways under general laws. *Ibid*.
4. In the amended charter of the city of Lowell, St. 1896, c. 415, § 3, creates a department of supplies, and § 7 prohibits the city council from taking part in the purchase of material or in the making of contracts for the city. In the year 1900 the city council of Lowell passed an ordinance approved by the mayor, providing, "That all printed matter for the city of Lowell shall hereafter bear the imprint of the Union Label of the Allied Printing Trades Council of Lowell, Mass.," and "That in calling for bids for city printing hereafter, the chief of the department of supplies shall make stipulation in accordance with" the foregoing requirement. The board of health of Lowell advertised for bids for printing certain blanks and letter heads, and accepted a bid of \$24.50 from a bidder who had a right to use the union label, declaring by vote that they did so for that reason, and rejecting a bid of \$16.55 from a bidder who had not the right to use the label. On a petition of more than ten taxable inhabitants under St. 1898, c. 490, to enjoin the payment of money by the city under the contract, it was *held*, that the ordinance was invalid.

as an attempt to interfere in the making of contracts for printing, by directing with whom the contracts should be made, and was in direct conflict with the provisions of the amended charter; that, whether the ordinance applied to the board of health or not or whether or not they called for bids in accordance with it, the fair inference was that in awarding the contract that board did not exercise their untrammelled judgment but were controlled by the illegal behest of the ordinance which they supposed to be binding upon them; so that the contract was void and the money of the city was about to be illegally expended, which brought the case within St. 1898, c. 490. *Goddard v. Lowell*, 496.

Officers and Agents.

5. If a city or town, instead of leaving the repair of its ways to the public officers designated by the statutes, undertakes to make the repairs by its own agents, it is liable for injuries caused by their negligence. *Butman v. Newton*, 1.
6. The city of Newton by ordinance provided, that, under the supervision of a joint standing committee of the common council and board of aldermen, the superintendent of streets should have the charge of the making, widening and altering of streets and ways. *Held*, that this made the superintendent of streets the agent of the city, and that the city was liable for an injury caused by the negligence of workmen under his direction operating a stone crusher to prepare material to be used in constructing a new street. *Ibid*.

Contract made by town with contractor also member of building committee of town and whose vote created majority which accepted his bid valid, or if voidable, may be ratified, see AGENCY, 8; CONTRACT, 6.

City estopped to rescind agreement relating to sewer assessment while retaining land conveyed as the consideration, and by statements of city officers, see ESTOPPEL, 1.

City of Boston held liable for flooding cellar constructed in violation of law, see NEGLIGENCE, 8.

Liability of city for negligence of its agents in operating stone crusher, see NEGLIGENCE, 14.

What constitutes reasonable notice of defect in way, see WAY, 1.

Powers of Gloucester Water Supply Company, see GLOUCESTER WATER SUPPLY, 1-3.

Liability of town not maintaining high school for tuition of child at high school in neighboring town, see SCHOOL.

Requirement that street railway shall water certain portion of street over which location is granted valid, see STREET RAILWAY, 3.

NEGLECT.

Contributory Negligence and Due Care.

1. A tenant in a building having a right to use a water closet in the basement, who goes into the closet in the dark without a light and bumps his

Negligence (continued).

head against a protruding gas pipe which has been in the same place during the whole of the two months that he has occupied his premises, is not in the exercise of due care and cannot recover for an injury thus incurred. *Kiander v. Brookline Gas Light Co.* 341.

2. A coal shoveller, about to unload a team which is backing towards a pile of coal, who places himself behind the wagon and walks backwards with his hands on the doors at the end of the wagon, and in so doing is caught between the wagon and a post which he knew was there and could have seen by looking around, has voluntarily assumed the risk of injuries so caused and is not in the exercise of due care. *Neylon v. Phillips*, 334.

Of passenger leaving train standing elsewhere than at station, see *post*, 5.

Of passenger alighting from moving train, see *post*, 6, 7.

Of driver in open wagon approaching street railway crossing, see *post*, 11.

Of person anchoring boat in improper place, see *post*, 13.

Of person driving in street unfit for travel, see *WAX*, 2-4.

Not material in action for fire caused by locomotive engine, unless gross or amounting to fraud, see *RAILROAD*, 4.

Assumption of risk,

By workman removing belt from rapidly revolving shaft, see *post*, 15.

By employee using oil governed air hoist, see *post*, 18.

Violation of Statutory Requirement.

3. The fact that a plaintiff has constructed his cellar in Boston below the grade required by St. 1892, c. 419, § 31, does not prevent his recovering damages from the city for injuries caused by the city negligently having stopped the outlet of an arm of the sea, so that the water overflowed its banks, crossed the street on which the plaintiff's house stood and poured into his cellar, if the plaintiff's violation of the law did not contribute to the injury. *Semble*, otherwise, if the injury was caused by percolation, as in that case the putting of the bottom of the cellar below the established grade must have contributed to the injury. *Biggio v. Boston*, 356.

Effect of plaintiff failing to observe regulations concerning fog signals, see *post*, 13, *SHIP*.

On Railroad.

4. A passenger, who leaving a train walks along a station platform on which other passengers are walking ahead of him and falls by stepping on a banana skin and is injured, cannot recover from the railroad company, if it does not appear how long the banana skin had been there or how it got there. *Goddard v. Boston & Maine Railroad*, 52.
5. A railroad train after stopping at a station backed from the station for the purpose of switching the rear cars upon another track, and stopped. The plaintiff was a passenger and wished to pass through the train to the rear car. Finding one of the cars crowded, he stepped off the platform of the car intending to go to the rear of the train on the outside. It was very dark and he could not see and did not know where he was stepping. The train was on a bridge over a river, and the plaintiff fell through into the water below and was injured. The platform from which the plaintiff

stepped was about seven hundred feet from the station. The plaintiff was familiar with the station and the bridge. He knew that the train had backed toward the river, but did not know how far it had backed and underestimated the distance. *Held*, that the plaintiff did not use due care; that he took the chances and must abide the result. *Kellogg v. Smih*, 595.

6. A passenger who is injured in attempting to alight from a railroad train after it has stopped at a station and started again, knowing that the train is in motion when he steps off, is not in the exercise of due care and cannot recover from the railroad company. *La Pointe v. Boston & Maine Railroad*, 535.
7. In an action to recover for injuries sustained by the plaintiff, a woman sixty-one years old, in falling from a train when she was attempting to alight, after the train had stopped at her station and started again, it appeared, that the accident happened about three o'clock in the afternoon, that the plaintiff wore a veil and carried a handbag and a bundle containing some books tied with a string, that when she and other passengers started to leave the car one of the books slipped out, that she stooped and picked it up and while walking to the end of the car was trying to get the book under the string, that before reaching the end of the car she saw a brakeman come into the car, shut the door and sit down, that the other alighting passengers at this time were on the platform of the station, that she opened the door, stepped out on to the platform of the car, and began to descend the steps on the opposite side from the station platform, saw that the train was moving, either stepped off or fell off of the lower step after the train had started, and struck the ground some distance from the end of the station platform. *Held*, that a verdict should have been ordered for the defendant; that the plaintiff either stepped off the train when she knew it was in motion or, if she fell, descended the steps when if she had used her faculties she could not have failed to notice that the cars were moving, and in either case was not in the exercise of due care. *Ibid*.

On Street Railway.

8. A passenger in a street car assumes the risk of collision with an obnoxious drunken passenger whom the conductor is removing by force in a reasonable manner. Following *Spade v. Lynn & Boston Railroad*, 172 Mass. 488. *Cobb v. Boston Elevated Railway*, 212.

Duty of street railway company towards employee of another using pole in common working upon its wires without its permission, see *post*, 20.

For case of person driving in open wagon run into by street car at crossing, see *post*, 11.

Duty of conductor of street car to remove intoxicated passenger, see *STREET RAILWAY*, 1.

In Driving.

9. It is no evidence of negligence on the part of the driver of a coal team, backing it towards a pile of coal and knowing the plaintiff to be behind the wagon, that as the team approached the pile of coal the horses backed more quickly and that, from some unexplained cause, the wagon swerved

Negligence (continued).

and caught the plaintiff between it and a post and injured him. Horses backing as these were cannot be expected to move at the same rate of speed all the time. *Neylon v. Phillips*, 334.

10. In an action against a teamster for injuries to the plaintiff caused by being thrown from the back of a covered one horse wagon of the defendant, it appeared, that the defendant had been employed by a carpenter for whom the plaintiff worked, to transport some materials from a building to the carpenter's shop, and that the plaintiff got into the wagon at the invitation of the driver and of his employer, that the wagon stopped about five feet from the door of the shop, there being another team in the way, and the plaintiff was standing in the back of the wagon and was about to hand out a box to his employer, when the horse started and he was thrown out. The horse probably was started by the driver in trying to get his wagon to the right place in front of the shop door, the other team having moved away. *Held*, that there was no evidence of negligence on the part of the driver. The facts that the wagon moved and that the plaintiff, without the driver's knowledge, happened to be standing in such a way as to lose his balance when it started, would not justify a finding that the driver was negligent. There was nothing that required the driver to give notice that he was going to move forward five feet. *Firth v. Rich*, 206.

11. In an action against a street railway company for injuries caused by the plaintiff being run into by a car of the defendant, it appeared by the plaintiff's evidence, that the plaintiff was driving in an open wagon approaching a street along which the defendant's tracks ran; that when eighty feet distant from the tracks he had a clear view of the tracks for a distance of from three hundred to three hundred and fifty feet from the corner he was approaching; that he looked in both directions and no car was in sight; that from this point until his horse was actually upon the track his view was so obstructed by trees that he could not see a car coming from the right; that when on the track he saw a car ten or twelve feet away coming from the right at the rate of from ten to sixteen miles an hour; that the horse turned or was turned by the plaintiff to the left and was struck on his hind quarters by the car and the plaintiff thrown out and injured; that the plaintiff drove over the eighty feet intervening between his view of the tracks and the point of collision at the rate of from four to five miles an hour, which was the usual rate of speed of the defendant's cars at this place; that while so driving the plaintiff listened but heard no gong and no noise indicating the approach of a car; that it was shortly after seven o'clock on the evening of November 24, and a light snow was falling with a little rain. *Held*, that there was evidence to go to the jury that the plaintiff was in the exercise of due care; that it might have been more prudent, to drive over the eighty feet where the plaintiff's view to the right was obstructed at the usual rate of speed of the defendant's cars at that point, than to have driven more slowly and thus have given a car which was more than three hundred feet away when the plaintiff saw the tracks more time to get to the crossing, and the court could not say as a matter of law that the plaintiff should have got down

from his wagon, gone forward in advance of his horse and looked to see whether a car was coming before driving on to the crossing. *Kelly v. Wakefield & Stoneham Street Railway*, 542.

In a Building.

12. In an action for personal injuries, there was evidence, that the plaintiff had come to the defendant's shop to purchase furniture and had followed a salesman and a friend through a doorway hung with portières into a room where the light was dim and less than in the room she had left, when her foot caught and she fell down a flight of stairs leading to the basement and was injured, that a rubber mat over which she passed was curled up at the edge, was of cheap material and much worn and had been in the same condition for two or three months previously, also that at the time of the accident the head of the staircase was unguarded although a desk was usually kept there. The plaintiff contended that her fall was due to the bad condition of the mat and the unguarded condition of the staircase. *Held*, that there was evidence for the jury of the defendant's negligence. *Toland v. Paine Furniture Co.* 501.

Collision of Vessels.

13. In an action against a steamboat company to recover for injuries alleged to have been received from a steamboat of the defendant running down the plaintiff's fishing boat while at anchor, it appeared, that the plaintiff's boat was a fourteen foot boat propelled by oars, that the plaintiff and a companion anchored their boat close to the outer edge of the channel in Hull Gut in Boston harbor, and began to fish; that there was fog or haze in the Gut at the time; that the defendant's steamboat coming through the Gut on its regular trip when not far distant from its landing place at Hull came into collision with the plaintiff's boat or passed so near it as to cause the plaintiff to jump out and receive the injuries complained of; that the steamer was running at a low rate of speed and was giving the signals and warning prescribed by the United States statutory regulations in case of fog; and that the plaintiff gave no signal and had no means on board his boat of giving any signal. The regulations provide that in fog or mist, whether by day or night, a vessel when at anchor shall, at intervals of not more than one minute, ring the bell rapidly for about five seconds, and another provision requires, that "All rafts or other water craft, not herein provided for, navigating by hand power, horse power, or by the current of the river, shall sound a blast of the fog-horn, or equivalent signal, at intervals of not more than one minute." *Held*, that on all the evidence the plaintiff was not entitled to recover, as it was impossible to say that his violation of the statutory regulation by his lack of signals did not contribute to the accident. *Semble, also*, that the plaintiff was negligent in anchoring his boat in an improper place and in doing nothing when he saw the steamboat coming, he having made no effort to cut his anchor rope or to row out of danger, and that it could not be said that anchoring his boat in an improper place did not contribute to the collision. *Chesley v. Nantasket Beach Steamboat Co.* 469.

Effect of violation of statutory regulations on plaintiff's right to recover, see *ante*, 3, SHIP.

Negligence (continued).

Of City operating Stone Crusher.

14. To dump a load of stone on the wooden platform of a stone crusher and start up the engine of the crusher letting off steam just as a horse which is being driven on a roadway twenty-five feet away and in plain sight is opposite to it, may be found to be a negligent act on the part of the agents of a city operating the crusher. *Butman v. Newton*, 1.

Employers' Liability.

Assumption of risk.

15. In an action at common law by a workman in a factory against his employer for personal injuries, it appeared, that the plaintiff, a man of great experience and long service in the factory, was injured while attempting in a dim light to remove a belt from a rapidly revolving shaft. There was a safe way of removing the belt which he knew. He was using another way, when the belt caught in a space between the collar and a fixed pulley, and the plaintiff was carried up to the shafting and injured. *Held*, that if the way of removing the belt adopted by the plaintiff was dangerous, the risk was an obvious one which he must have known and chose to incur, and that he could not recover. *Cushman v. Cushman*, 601.

By coal shoveller about to unload team, see *ante*, 2.

By employee using oil governed air hoist, see *post*, 18.

Ways or works.

16. In an action under St. 1887, c. 270, § 1, by a plumber's helper against his employer, it appeared, that the defendant was doing the plumbing work of a building in process of construction. There were no stairs in the building, but access from floor to floor was had by means of ladders connecting stagings built in the elevator well on the level of each floor. The plaintiff was injured by one of these stagings giving way when he was upon a ladder resting on it. The defendant had nothing to do with the construction of the stagings. They were built before he began his work and were used by all the workmen of the different contractors. *Held*, that there was no evidence which would warrant a jury in finding that the ladders and stagings formed a part of the ways or works of the defendant within the meaning of the act. *Riley v. Tucker*, 190.

Duty to provide safe appliances.

17. In an action at common law by a workman in a factory against his employer for personal injuries, it appeared, that the plaintiff was injured while attempting to remove a belt from a revolving shaft. The plaintiff offered to show, that he told the defendant, that there ought to be a shipper on the belt, to ship it over the loose pulley and to hold it there, and also to show, that the belt would not stay on the loose pulley because there was no shipper to drop into a notch to hold it. The evidence was excluded. *Held*, that the exclusion of the evidence was right, as there was no evidence that the machine ever had a shipper, and the defendant was not bound to change the condition of the machine in this respect. *Cushman v. Cushman*, 601.

18. A superintendent in a factory changed the check valve of an oil governed air hoist, taking out the half inch valve that had come with it and inserting in its place a three quarters inch valve, which was guaranteed by its manufacturer to stand a pressure of three or four hundred pounds per square inch. If the whole air pressure of the hoist was turned on without a load being attached to the piston rod, the pressure would be from twenty-seven to twenty-eight hundred pounds per square inch. In about two weeks this valve split, and the superintendent replaced it by another three quarters inch valve of the same kind. He did this without ascertaining how much pressure the new valve would stand or how much it might be subjected to when the hoist was in use. He testified, that he did not consider himself an expert mechanic, and thought the preceding valve split because it had some flaw or defect in it. About ten weeks later, when the plaintiff was about to hook a load on the hoist, he was injured by an accident caused by the new valve splitting in the same way that the preceding one had done. The defendant showed, that the plaintiff had been told never to turn on the whole air pressure when no load was attached, and not to turn on any air pressure at all until it was needed to lift a load, but it appeared, that the only practical way of hooking on a load was to start the hoist slowly rising and to hook on the load as it ascended, that this required an opening of the air valve, that the apparatus in an oil governed air hoist prevents the operator from knowing immediately on opening the air valve how much air pressure has been turned on, and that in operating such a hoist it might happen that the whole pressure was on, without the operator necessarily having made an unreasonable use of the machine. The plaintiff testified, that he did not know whether he had the full head of air pressure on at the time of the accident or not though he "probably" did have it on. *Held*, that these facts would warrant a finding that the defendant did not use due care in furnishing a safe hoist. *Held, also*, that the plaintiff did not assume the risk of the accident, that he was not chargeable with knowledge that the defendant's superintendent had substituted a three quarters inch check valve, not designed to stand the pressure to which it might be subjected, and had never taken the risk of such a hoist. *Held, also*, that the jury were warranted in finding that the plaintiff was in the exercise of due care. *Slattery v. Walker & Pratt Manuf. Co.* 307.

Acts of superintendence.

19. The proprietor of a factory is liable to an employee injured by an accident, caused by the breaking of the check valve of a hoisting machine, due to the act of the defendant's superintendent in negligently substituting an insufficient valve for the one which came with the machine. *Ibid.*

Employee of another using Poles in common.

20 A street railway company owning and maintaining poles supporting wires that hold and protect its trolley wires, which has granted to a telephone company for a consideration the right to use its poles for the purpose of supporting telephone wires, is not liable for negligence to an

employee of the telephone company who falls by reason of an electric shock received by him while attempting to tighten a slack span wire of the railway company. The highest duty owed by the railway company to a person thus at work upon its wires without its permission, is not wilfully or wantonly to injure him. *Sias v. Lowell, etc. Street Railway*, 343.

Municipal corporation liable for negligence of agents repairing streets, see MUNICIPAL CORPORATIONS, 5, 6.

NEGOTIABLE INSTRUMENTS ACT.

As to construction of § 124 of negotiable instruments act, St. 1898, c. 533, relating to material alterations, see ALTERATION OF INSTRUMENTS, 3.

Degree of particularity in bill for relief by reason of material alteration, under St. 1898, c. 533, § 125, see ALTERATION OF INSTRUMENTS, 2.

NUISANCE.

St. 1887, c. 348, providing that a fence unnecessarily exceeding six feet in height, maliciously erected or maintained for the purpose of annoying the owners or occupants of adjoining property, shall be deemed a private nuisance, and giving a remedy for damages sustained thereby, does not apply to a fence which is not on or near a division line. A fence from three to ten feet from a division line and extending its entire length is not on or near it. *Brostrom v. Lauppe*, 315.

Extent of jurisdiction of town boards of health over nuisances affecting purity of water supply, see BOARD OF HEALTH, 2.

Summary proceedings of boards of health abating nuisances not subject to judicial examination, see BOARD OF HEALTH, 3; SUPERIOR COURT.

Construction of order of town board of health adjudging certain deposits on land of plaintiff to be nuisance, see BOARD OF HEALTH, 4.

Motive of town board of health in adjudging that nuisance exists immaterial, see BOARD OF HEALTH, 5, 6.

ORDER.

Acceptance. Construction.

The defendant, a real estate agent, procured for one H., who wished to build a house on a certain lot, a building loan and mortgage for \$10,500. The mortgagee advanced under the mortgage \$4,500 to the mortgagor, and \$6,000 to the defendant. This sum the defendant deposited in a bank in his name as trustee, and drew checks upon it signed as trustee with which he made payments on account of the mortgagor for building materials, lumber and otherwise. H. delivered to the plaintiff, a lumber dealer, an order on the defendant to pay for lumber. The defendant accepted it in the words "Accepted as I am conveyancer for the mortgagee of Lot 5, Lancaster Terrace" and inserted a similar description after his name in

the body of the order. The order contained the words "Charge the same to the \$1,800 payment" and also the words "Said order to be paid on or before November 1st, '99." The \$1,800 payment referred to was the last payment to be made upon the building contract and did not become due until after November 1, 1899, and after the date of the writ. The defendant when he accepted the order had in his hands enough of the trust fund to discharge the obligation. In an action on the order, it was *held*, that the defendant was not an agent of the mortgagee but a trustee holding funds of the mortgagor to be applied to the building of the house, and by his acceptance bound himself personally. Whether the words inserted by the defendant in the order, after its execution by the drawer, and the language of the acceptance, limited the defendant's liability to the amount of the trust fund in his hands, was not considered, as he had ample funds in his hands at the time. *Held, also*, that the direction to "Charge the same to the \$1,800 payment" merely indicated to what sum as between the drawer and acceptor the payment of the order should be charged, and that the defendant by his acceptance was bound to pay the order by November 1, 1899, at the latest. *Shepard v. Abbott*, 300.

PARENT AND CHILD.

Loss of services necessary for recovery in action for seduction of child, see SEDUCTION.

PARTIES TO ACTIONS.

Joinder of builder and his assignee in petition to enforce mechanic's lien, no error, see MECHANIC'S LIEN, 10.

Assignee for benefit of creditors may maintain action in his own name, see CONTRACT, 19.

PARTITION.

Writs of partition, recognized by Pub. Sts. c. 178, § 1, still may be used in this Commonwealth, although abolished in England in 1834, and superseded here in practice by petitions for partition. *O'Brien v. Mahoney*, 200.

Tenants in common entitled to partition as matter of right, see JOINT TENANTS, 1, 2.

Jurisdiction of Probate Court of petitions for partition, see PROBATE COURT, 2, 3.

PAYMENT.

The rule in Massachusetts, in simple contract debts, is, that a promissory note given by a debtor to his creditor is presumed to be a payment, and the presumption is one of fact, which may be rebutted and controlled by evidence that such was not the intention of the parties. *Semble*, that there is never a presumption that a note is intended to operate as payment in case of the insolvency of the maker before it is negotiated. *Brewer Lumber Co. v. Boston & Albany Railroad*, 228.

PHARMACY.

St. 1896, c. 397, § 9, provides that the license of a registered pharmacist shall not be revoked for a cause punishable by law until after conviction by a court of competent jurisdiction. A registered pharmacist pleaded guilty to a complaint in the Superior Court charging him with an unlawful sale of intoxicating liquor, and thereupon that court ordered the complaint placed on file, and there was no other order or proceeding in the case. *Held*, that this was a conviction within the meaning of the above clause and that the license of the pharmacist could be revoked on a charge of keeping intoxicating liquors for the purpose of unlawful sale. *Munkley v. Hoyt*, 108.

PLEADING, CIVIL.

Demurrer.

1. Under Pub. Sts. c. 167, § 12, it is sufficient to allege as a cause of demurrer for a defect of substance, that the declaration does not state a legal cause of action. The words "substantially in accordance with the rules contained in this chapter" need not be added unless the defect relied on is one of form. *Whiton v. Batchelder & Lincoln Corp.* 169.

General Denial.

2. In replevin under our practice there may be a judgment for a return under a general denial, which is broader than the old plea of *non cepit* and puts in issue the plaintiff's right of possession. *D'Arcy v. Steuer*, 40.

In Tort.

General denial: Justification.

3. In an action for trespass to the person, where assault and unlawful arrest and imprisonment are alleged, and the defence is a general denial not setting up a justification, whether the allegation in the declaration that the arrest and imprisonment were unlawful makes it an issue whether the arrest if proved was unlawful, *quære*. *Dixon v. New England Railroad*, 242.
4. In an action by a passenger against a railroad company for alleged unlawful arrest of the plaintiff by a police officer at the request of a conductor of the defendant, on the charge of evading the payment of fare, the defendant introduced evidence that the conductor, having come with the plaintiff into the presence of the police officer, demanded payment of the fare, which the plaintiff refused in the police officer's presence, that the police officer examined the ticket and said it was not good because it was punched, that the conductor then again demanded payment of the fare, which the plaintiff again refused, and that the police officer thereupon arrested the plaintiff. The plaintiff asked for a ruling, that the question of the good faith of the police officer in making the arrest, as testified to in the case, was not an element to be considered by the jury in determining the case. This ruling was refused. *Held*, that the refusal was right. The jury could find that the conductor did not himself assault or arrest the plaintiff and that his words and acts were not a direction to

make the arrest, but a demand that the officer should exercise the jurisdiction which the statute had given him, and that the officer made the arrest upon his own authority and judgment in view of what he himself had seen and heard, and upon this aspect of the case the good faith of the officer and his belief, that a fraudulent evasion of fare had been consummated under his own eyes, could not be said to be immaterial. *Held, also*, that although the answer in this case was a general denial and did not set up the defence of a justification, which always must be pleaded, yet the evidence above stated in regard to the acts of the police officer was admissible, not merely in mitigation of damages, but could be considered upon the question whether the arrest was the act of the police officer alone, and, if this was found by the jury to be the fact, it was a defence, because in that case the allegations that the wrongs were done by the defendant and its officers were not proved. *Dixon v. New England Railroad*, 242.

PLEDGE.

An owner of machinery attempted to pledge or mortgage it by giving an unrecorded bill of sale of it and retaining possession of the property. After the transaction, the pledgor paid the attempted pledgee a monthly rent for the use of the machinery. *Semble*, that the fact that the parties went through the form of paying and receiving the rent although evidence of a change of possession did not conclusively establish it. *Haskell v. Merrill*, 120.

POWER.

Of Appointment.

1. It is a familiar rule of law, that a donee of a power of appointment, who is given authority to choose and appoint an object of the power according to his judgment and discretion, cannot delegate the exercise of that discretion to another. But one having an estate with a power of appointment, under which he may give an absolute interest, or may put limitations on the use and enjoyment of that which otherwise would be such an interest, properly may exercise the power by giving one substantially the whole interest in the property and the whole control of it, in the form of a right of personal use and enjoyment during his life, with a right to appoint who shall have it after his death. *Thayer v. Rivers*, 280.
2. A will giving to the testator's children life estates with power of testamentary appointment contained this provision: "It is my will that my daughters and son shall have power of disposing of their respective shares of my estate among my lineal heirs, to have and enjoy the same upon such terms and provisions as may be prescribed by my children." A daughter of the testator, in attempted execution of this power, gave life estates to such of two nieces and a nephew as should survive her, and after their respective deaths the trustee was directed to convey the proportion or share of the trust fund which had been enjoyed for life by the decedent to such person or persons except the husband of one of the nieces as the

decendent might by will appoint; and, in default of such appointment, to convey the share to the issue of the decendent. The nephew survived his aunt and died leaving a widow and two children, and by his will appointed his share of the property to his wife for life and after her death to his children in equal shares. *Held*, that the appointment by the daughter of life estates to her two nieces and her nephew was good, but that the attempted gift to her nieces and nephew of the power to appoint anybody except the husband of one niece was void, because, whether or not it was void for other reasons, it purported to authorize an appointment to others than the lineal heirs of the original testator and thus exceeded the terms of the power under which she attempted to act. Therefore the attempted appointment in the will of the nephew under the invalid authority was as if it had never been made, and his share of the property went to his children under the appointment in his aunt's will providing that in default of appointment by him it should go to his issue. *Thayer v. Rivers*, 280.

Power of sale in mortgage a power coupled with an interest and irrevocable, see MORTGAGE, 6.

PRACTICE, CIVIL.

Appeal.

1. An appeal from an order or judgment of the Superior Court on an award, under Pub. Sts. c. 188, § 12, must be founded on matter of law apparent upon the record, and one wishing to object to the ground on which a judge of the Superior Court granted or denied a motion to confirm an award must raise the question by exception, and not by appeal, unless the ground of the decision appears upon the record. *Giles v. Royal Insurance Co.* 261.
2. A suit to enforce a mechanic's lien was brought in a district court against the owner of the land on which the lien was claimed and his mortgagee. The District Court ordered the lien established, and the owner appealed but the mortgagee did not. In the Superior Court both the owner and the mortgagee appeared and were represented at the trial and both excepted to the rulings of the judge of that court who ordered the lien established. The points raised involved the rights of the mortgagee. *Held*, in a decision sustaining the lien, that whether the appeal of the owner alone brought up the whole case was immaterial, as all parties had been fully heard. *Osborne v. Barnes*, 597.

Auditor's Report.

Auditor's report as *prima facie* evidence, see AUDITOR, 1.

Presumption as to auditor's report after oral evidence, see EVIDENCE, 2.

As to objection that auditor's report contains inadmissible evidence, see AUDITOR, 2.

Charging Jury.

3. Where the judge in charging a jury in an action for seduction used language which might seem to indicate that his opinion on the matters referred to was favorable to the plaintiff, and where it would have been

better if his expressions had been more guarded, yet if taking the charge as a whole no intentional argument or expression of opinion appears, there is not a violation of Pub. Sts. c. 153, § 5, nor such error as would justify disturbing a verdict for the plaintiff. *Cook v. Bartlett*, 576.

Double Costs.

4. In this case it was adjudged that the exceptions were frivolous and appeared to have been intended for delay, and double costs were awarded against the tenant from the time when the exceptions were alleged by him, with interest from the same time at the rate of twelve per cent a year upon the damages. *Demelman v. Bristoll*, 163.

Finding of Jury.

5. On a petition to enforce a mechanic's lien, the first issue was "Did the petitioners perform the labor and furnish the materials set forth in the petition under the contract therein set forth?" Upon this issue the jury answered "No," but their answers upon the other issues showed that they meant by this answer merely that the contract had not been fully performed. *Held*, that the answer should be thus interpreted and was no bar to the establishment of the lien. *Moore v. Dugan*, 153.

Election of Remedy.

6. The payee of an indorsed promissory note brought an action against the maker with counts on the note and for money lent and money had and received. While this action was pending he brought an action against the indorser. This court deciding that the note was void but that the payee had a cause of action on the common counts, the payee discontinued his suit against the indorser on the note and proceeded in his suit against the maker on the count for money lent. *Held*, that the plaintiff's concurrent pursuit of his alternate and inconsistent remedies waived neither of them, and that, by suing the indorser on the note while his suit against the maker was pending, he had not elected to rely on the note so as to prevent him from recovering on the common counts when the note was held to be invalid. *National Granite Bank v. Tyndale*, 390.

Exceptions.

7. If there has been no preliminary understanding or arrangement for saving a party's rights, it is too late to except to a finding as unwarranted by the evidence after it has been made. The rule is the same when the finding is made by a judge as when made by a jury. *Keohane, petitioner*, 69.
8. A general exception to a portion of a judge's charge covering more than three pages of the printed record on a matter not pointed out to the judge by the excepting party is bad. *Leverone v. Arancio*, 439.
9. A general exception "to the foregoing instructions" following nearly four printed pages of a judge's charge, dealing with different aspects of the case, in which no error was called to the attention of the judge at the trial, must be overruled. *Dixon v. New England Railroad*, 242.

Practice, Civil (*continued*).

Parties.

Joinder of builder and his assignee in petition to enforce mechanic's lien, no error, see **MECHANIC'S LIEN**, 10.

Assignee for benefit of creditors may maintain action in his own name, see **CONTRACT**, 19.

Rulings and Instructions.

10. A judge properly may refuse to give a ruling which requires him to pick out particular facts and instruct the jury as to their effect. *Jaquith v. Rogers*, 192.

11. A request for a ruling not incorrect in law but put in such a form as to amount to an argument, and otherwise unnecessary, properly may be refused for that reason. *Wyman v. Whicher*, 276.

12. A request for a ruling sound in law should be refused if upon the evidence as it stands the ruling would have a tendency to mislead the jury. *Dixon v. New England Railroad*, 242.

Verdict.

13. A general verdict on two counts for different causes of action one of which is good and the other bad must be set aside. *Leverone v. Arancio*, 439.

Sufficiency of delivery of written demand required by statute to enforce lien, see **LIEN**.

Assumption as to treatment by trial judge of evidence admissible for one purpose but inadmissible for another, see **WITNESS**, 2.

PROBATE COURT.

Jurisdiction.

1. The Probate Court has no jurisdiction to make a decree, under Pub. Sts. c. 142, § 1, against the administrator of a party to an agreement to convey real estate, for the specific performance of the agreement, without first giving notice to all persons interested. *Nazro v. Long*, 451.

2. Pub. Sts. c. 178, § 43, providing that where a party after partition of lands has been evicted from his share he is entitled to a new partition, applies to a partition made in the Probate Court, which under Pub. Sts. c. 178, § 45, has concurrent jurisdiction with the Supreme Judicial Court and Superior Court of petitions for partition in cases where the shares or proportions do not appear to be in dispute or uncertain. *O'Brien v. Mahoney*, 200.

3. Under Pub. Sts. c. 178, § 45, giving to the Probate Court concurrent jurisdiction with the Supreme Judicial Court and Superior Court of petitions for partition of lands in cases where the shares or proportions do not appear to be in dispute or uncertain, if the parties are heirs at law of an unsettled estate and their respective shares and proportions are ascertained, the Probate Court has jurisdiction, regardless of the fact that the estate of the ancestor is in course of settlement. *O'Brien v. Mahoney*, 200.

RAILROAD.

Nature of Ticket.

1. It is not correct to say, that a railroad ticket is only a symbol of the contract between the company and the passenger and a piece of evidence showing what the real contract is. A railroad ticket may be more than a symbol, and it may not show what the real contract is. Per BARKER, J. *Dixon v. New England Railroad*, 242.
2. A passenger may have a right to transportation between two stations on a railroad because of his purchase of a certain ticket, and yet if the ticket itself is not in order, a conductor is not bound to take it in payment of fare. *Ibid.*
3. In an action by a passenger against a railroad company for alleged unlawful arrest of the plaintiff on the charge of evading the payment of fare, it appeared, that the plaintiff, without obtaining a stop-over check, got off at a station after his ticket, which entitled him to travel to a station beyond, had been punched twice by the conductor. He took the next train to continue his journey and offered the same ticket which the conductor of that train refused to accept. It was shown, that, under the rules of the railroad, the punching of the ticket twice by the first conductor cancelled it and made it unreceivable for passage on another train. *Held*, that on these facts it was right to instruct the jury, as matter of law, that under the circumstances the ticket was not good for the plaintiff's passage on that train at that time, and that it was not a ticket that the conductor was obliged to take in payment of fare. *Ibid.*

Liability for Fire.

4. In an action against a railroad company under Pub. Sts. c. 112, § 214, to recover for the destruction of the plaintiff's property by fire communicated by a locomotive engine of the defendant, the plaintiff is not bound to show ordinary care on his part. If the fire was caused by sparks from the defendant's engine, the plaintiff can recover unless his negligence was gross or such as to amount to fraud. *Bowen v. Boston & Albany Railroad*, 524.
5. The evidence in this case stated in the opinion was held to warrant a finding of the jury that the fire which destroyed the plaintiff's mill was caused by sparks from one of the defendant's locomotives. *Ibid.*
6. In an action under Pub. Sts. c. 112, § 214, to recover for the destruction of the plaintiff's mill by fire alleged to have been communicated by a locomotive engine of the defendant, the defendant introduced evidence tending to show that the engines which ran by the plaintiff's mill were equipped with spark arresters and extension fronts and standard netting, and would not and could not throw out sparks so as to set a fire. The plaintiff in rebuttal was allowed against objection, to introduce evidence tending to show that a certain kind of engine used by the defendant which ran by the plaintiff's mill when equipped with spark arresters and netting of the standard kind, all in good condition, would throw out sparks and set fires and had done so; that there were no appliances that would prevent a locomotive under all circumstances from throwing out

live sparks and setting a fire ; and that an engine with an extension front and a spark arrester with a netting of the kind exhibited would sometimes give out live cinders so as to set a fire. *Held*, that the evidence in rebuttal rightly was admitted, as it bore directly upon the issue, whether an engine of the defendant caused or could have caused the fire. Whether the witnesses possessed the necessary experience and knowledge to qualify them to testify was for the presiding judge to say. *Bowen v. Boston & Albany Railroad*, 524.

Negligence on railroad, see NEGLIGENCE, 4-7.

REAL ACTION.

1. Under Pub. Sts. c. 173, § 18, giving the tenant in a writ of entry compensation for improvements if he has held the premises under a title which he had reason to believe to be good, a tenant cannot be allowed for improvements made after the bringing of the writ. *Demelman v. Bristol*, 163.
2. Under Pub. Sts. c. 173, § 14, a demandant prevailing is entitled to the net rental value of the premises during the time they are detained by the tenant, including their detention pending the tenant's motion for a new trial. *Ibid*.
3. A demandant in a real action claiming title under a sale on execution must prove that there was a valid judgment on which the execution issued, and the recital of the judgment in the execution is not the best or proper evidence to prove it as against a tenant who is a stranger to the proceedings on the execution, whatever might be the case if the judgment debtor were the tenant. *Frazer v. Nelson*, 456.

Seisin of tenant holding under tax sale, see TAX, 5, 7.

REAL PROPERTY.

Articles of plumbing affixed to house part of realty, see FIXTURES.

RECOUPMENT.

Recoupment of damages in action for conversion of articles of plumbing, see DAMAGES, 8.

REPLEVIN.

1. *Seemle*, that when in replevin there has been a judgment for a return upon a nonsuit followed by a breach of the replevin bond by a failure to return the property, a surety on the bond has a right to show that the defendant in replevin had no title. *Keohane, petitioner*, 69.
2. Where there has been a breach of a replevin bond by a failure of the plaintiff in replevin to return the goods on an order for a return, whether a surety on the bond by showing that the defendant in replevin was a bailee could reduce the damages recoverable to the value of his special interest, *quære*. *Keohane, petitioner*, 69.

General denial puts in issue plaintiff's right of possession, see PLEADING, CIVIL, 2.

RESTRICTION.

What constitutes violation of restriction; waiver of right to enforce, see EASEMENT, 3, 4.

General restrictions enforceable if statement of them substantially the same in all the deeds, see EASEMENT, 5.

Effect of violation of restriction by plaintiff upon right to enforce against others, see EASEMENT, 6, 7.

Whether certain acts constitute defence of laches to bill to enforce equitable restriction, see EQUITY JURISDICTION, 8.

SALE. .

Validity.

1. A dealer who sells intoxicating liquors in Massachusetts for transportation to the proprietor of a bar room in another State where the resale of the liquors by the purchaser would be illegal, and who correctly supposes that the purchaser intends to sell the liquors in his bar room in the other State but is wholly indifferent as to whether he does so or not, the purchaser knowing that the seller has no motive in making the sale except to sell his goods in Massachusetts in the usual course of business, may recover the price of the liquors in an action of contract. His divining correctly the defendant's intention does not connect the sale with the illegal consequences sufficiently to make it invalid. *Graves v. Johnson*, 53.

Indivisible Offer. Acceptance.

2. The plaintiff covenanted to sell and deliver to the defendant the capital stock of a certain company he then owned consisting of two hundred shares and comprising in all \$5,000 par value, and "in furtherance of this option" agreed to at once indorse the certificates in blank and deliver them to X. to be by him held in escrow and delivered to the defendant in the following manner: On payment of \$1,000 within fifteen days from the date hereof X. to deliver to the defendant forty shares, and on payment of \$2,000 within thirty days thereafter eighty shares, and on a further payment of \$2,000 within thirty days after the second payment, the remainder of the shares. "It is understood and agreed that this option expires and becomes null and void if not accepted within fifteen days and in that event X. is to immediately return to me said certificates delivered to him in escrow." The defendant paid the first \$1,000 and received the stock for it and afterwards refused to make further payments. There was evidence that the defendant said to the plaintiff's attorney "that he would not be forced to pay for the certificates; that he would pay for them when he got good and ready." *Held*, that the offer was an indivisible one to sell the whole lot of two hundred shares, and that there was evidence of its acceptance. Even if the defendant could make a payment and receive stock under the offer without accepting it, his statement to the plaintiff's attorney might be found to imply an admission that he bought the stock. *Held, also*, that evidence of the market value of the shares, offered by the

Sale (continued).

defendant to show that there was little change of value from the contract price, rightly was excluded, as the action was not for the breach of an executory contract but for goods bargained and sold and this action would lie. *Semble*, that even an action for goods sold and delivered might lie. *Obery v. Lander*, 125.

Stoppage in Transitu.

3. The right of stoppage *in transitu* may be exercised in spite of the fact that the vendor has accepted the purchaser's promissory note and receipted his bill for the goods, if he produces the note in court and tenders it to the maker's assignee and trustee in bankruptcy. It is immaterial that the note was indorsed by the plaintiff to a bank for collection or was discounted by the bank, if the plaintiff has the note in his possession at the commencement of the suit and tenders it at the hearing. *Brewer Lumber Co. v. Boston & Albany Railroad*, 228.
4. The right of stoppage *in transitu* can be exercised as long as the goods are in the hands of the carrier either *qua* carrier or as warehouseman. The transit does not terminate until the goods are in the possession, actual or constructive, of the purchaser, and the purchaser is not in or entitled to possession until he has discharged the carrier's liens, unless the carrier makes an agreement with the purchaser to hold the goods as his bailee or agent. *Ibid.*

Rescission.

5. The defendant in Gloucester gave to a salesman of the plaintiff, a corporation having a cash register factory in Ohio, a written order to ship to him one of the plaintiff's No. 14 cash registers as soon as possible, and agreed "on the fulfilment of the above" to pay \$190, ten dollars in cash and the remainder in twelve notes for ten dollars each payable in successive months. The title was not to pass until the last payment was made. The plaintiff's Boston agent wrote to the defendant "This register will be shipped you as soon as received from the factory." Six days after this and eight days after the original order, the plaintiff's salesman delivered to the defendant one of the No. 14 cash registers, whereupon the defendant paid \$10 in cash and gave twelve notes for \$10 each as agreed. Three days later the defendant returned the register with a letter stating that it was not what he had ordered, which was true, and demanding the return of his money and notes, and bought elsewhere a cash register of another make. The plaintiff by letter then acknowledged that the register was sent by a mistake and added "This error we will correct in a few days." Whereupon the defendant refused to receive any register from the plaintiff and demanded the cancellation of the order and the return of the money and notes. Thereafter the plaintiff tendered to the defendant and the defendant refused to receive a register in all respects in accordance with the order. The plaintiff retained the money and notes, and sued the defendant in contract, alleging that default had been made on one or more of the notes whereby all of them had become due. At the trial by a judge without a jury, the plaintiff contended that the first delivery was intended by the plaintiff as a loan for temporary use until the register

ordered could be made at its factory and shipped. The judge found that, whether the first delivery was intended as a loan or not, the defendant did not so understand it but supposed the register was delivered in performance of the order, and, upon ascertaining that it was not such a machine as he had ordered, was justified in returning it and supplying his need elsewhere, and ruled, that the plaintiff did not have the right to compel the defendant to take and pay for the machine tendered later, and found for the defendant. *Held*, that this ruling was correct and the finding justified by the facts, and that, even upon the plaintiff's theory, it had no right upon the first delivery, which by its own account was either a mistake or a temporary loan, to receive the money and notes, and ought to have returned them upon request, and, if the defendant was liable at all for his refusal to receive the machine tendered later, his liability would be for a breach of the agreement to purchase, and not upon the notes which were without consideration. *Hallwood Cash Register Co. v. Lufkin*, 143.

SCHOOL.

St. 1898, c. 496, § 3, provides as follows: "No member of the school committee of a town in which a public high school or a school of corresponding grade is not maintained shall refuse to approve the attendance of any child residing in such town in the high school of some other town or city if such child has completed the course of instruction provided by the former town, and, in the opinion of the superintendent of schools or the school committee of said former town, is properly qualified to enter such high school. If the school committee of such town refuses to grant such approval such town shall be liable for the tuition of such child, in the same manner and to the same extent as if the parent or guardian of such child had obtained the approval of the school committee." Under this statute a parent made a request of the school committee of a town of the class described in the statute maintaining no high school or school of corresponding grade, for their approval of the attendance of his child at the high school of a neighboring town. The request was not granted and no reason was given for not granting it. The child had completed the course of instruction provided by the home town. The father sent his child to the high school in the neighboring town and sued the home town under the statute for the sum paid for tuition. It appeared, that the child might have gone on with his studies in the home town in some unusual way and probably have been as far advanced as he was by attending the high school in the neighboring town, and thus have been ready to enter the high school which was established the next year in the home town. *Held*, that these facts warranted, if they did not require, a finding that the school committee refused to grant their approval of the attendance, and that such refusal made the town liable under the statute. *Fiske v. Huntington*, 571.

Constitutionality of statute compelling payment by town of tuition of child at high school in neighboring town, see CONSTITUTIONAL LAW, 5.

SEDUCTION.

In an action for seduction, the plaintiff cannot recover unless he shows a loss of services to which he was entitled, but, if his right to recover is established, his damages may include compensation for the injury to his feelings, and for the dishonor and disgrace brought upon him and his family. *Cook v. Bartlett*, 576.

SEISIN.

For case of instantaneous seisin, see *MECHANIC'S LIEN*, 8.

Seisin of tenant holding under tax title, see *TAX*, 5, 7.

Evidence to prove seisin, see *EVIDENCE*, 18.

SHIP.

The statutory regulations enacted by Congress to prevent collision of vessels are to be interpreted in the same way in the common law courts of a State as they are in the courts of the United States, if the action is for a maritime tort committed upon navigable waters within the admiralty jurisdiction of the United States. These are not mere prudential regulations, but binding enactments; and, when a vessel has committed a positive breach of statute, she must show, not only that her fault probably did not contribute to the disaster, but that it could not have done so. *Chesley v. Nantasket Beach Steamboat Co.* 469.

Effect of plaintiff anchoring his boat in improper place and failing to give fog signals, see *NEGLIGENCE*, 13.

SLAVE.

By the common law a disseisor got a title, although by wrong, and left only a right of action to the disseisee. So, a runaway slave, so long as he was *de facto* free, though liable to recapture, had the civil rights of a free person in a free State to which he had escaped. Per *HOLMES, C. J. Irving v. Ford*, 216.

Exterritorial effect of law of Virginia for legitimation of child born of slave marriage, see *CONFLICT OF LAWS*, 1.

Marriage in this Commonwealth of fugitive slave lawful while he remained here, see *MARRIAGE*, 1.

No presumption that common law of Virginia in 1846 gave any validity to slave marriages, see *MARRIAGE*, 2.

STABLE KEEPER.

For petition to enforce lien of, see *LIEN*.

STATUTE.

Where a new right is created by statute which at the same time provides a remedy for any infringement of it, that remedy must be pursued. Quoted with approval from *Osborn v. Danvers*, 6 Pick. 98, 99. *Harrington v. Glidden*, 486.

Remedy given by §§ 58, 59 of St. 1888, c. 390, relating to redemption from tax sales not exclusive, see *TAX*, 12.

Construction of § 87 f of bankruptcy act relating to levies and liens, see *BANKRUPTCY*, 1.

Construction of statute authorizing lease of Fitchburg Railroad, see *CORPORATION*, 4, 5.

Construction of statute changing time for levying assessments on policy holders of mutual fire insurance companies, see *INSURANCE*, 1.

Owner of easement in fee not "person having a freehold estate" under St. 1889, c. 442, see *INCUMBRANCE*; nor owner of a legal estate within meaning of land registration act, see *LAND REGISTRATION ACT*.

As to rule of construction for statutes of limitation, see *LIMITATIONS, STATUTE OF*, 1.

STATUTE OF FRAUDS.

See *FRAUDS, STATUTE OF*.

STATUTE OF LIMITATIONS.

See *LIMITATIONS, STATUTE OF*.

STATUTES CITED AND EXPOUNDED.

See page 699.

STREET RAILWAY.

Duties of Conductor.

1. It is the duty of a conductor of a street car to remove at once an intoxicated passenger who is vomiting profusely, and he need not wait until a woman passenger who has just entered the car has taken her seat and left the aisle clear. *Cobb v. Boston Elevated Railway*, 212.

Restrictions in Grant of Location.

2. Restrictions imposed by the aldermen of cities and the selectmen of towns in granting locations to street railway companies under Pub. Sts. c. 113, § 7, are not affected by St. 1898, c. 578, relating to street railways, it being expressly provided by § 11 of that act that the companies shall remain subject to such restrictions. *Newcomb v. Norfolk Western Street Railway*, 449.
3. A requirement, in a location granted under Pub. Sts. c. 113, § 7, by the selectmen of a town to a street railway company, that the company shall

water the street over which it is granted a location from curb to curb between April 15 and November 15 in each year, is a lawful restriction, and will be specifically enforced in equity by this court under Pub. Sts. c. 113, § 63. *Newcomb v. Norfolk Western Street Railway*, 449.

Passenger assumes risk of collision with drunken passenger being properly removed by conductor, see NEGLIGENCE, 8.

Duty of street railway company towards employee of another using pole in common and working upon its wires without its permission, see NEGLIGENCE, 20.

For due care of one driving open wagon approaching street railway crossing, see NEGLIGENCE, 11.

SUPERIOR COURT.

The Superior Court has no power, either under its general equity jurisdiction or under Pub. Sts. c. 80, § 26, to grant an injunction to restrain a town board of health from exercising the summary jurisdiction to abate nuisances given to it by Pub. Sts. c. 80, §§ 20-27. *Stone v. Heath*, 385.

SUPREME JUDICIAL COURT.

Jurisdiction under St. 1900, c. 426, § 3, authorizing lease of Fitchburg Railroad, see CORPORATION, 4.

SURETY.

Effect of judgment in action on bond given on petition to vacate judgment, see JUDGMENT, 1.

Surety on replevin bond can show that defendant in replevin was mere bailee, see REPLEVIN, 1, 2.

TAX.

Assessment.

1. Under Pub. Sts. c. 11, § 41, which requires assessors to ascertain as nearly as possible the particulars of the estate of any person who has not brought in a list as required by them, and to make an estimate thereof at its just value, according to their best information and belief, an objection, that the description of the personal property assessed is insufficient, is not tenable. *Harrington v. Glidden*, 486.

Statutes relating to assessment of taxes constitutional, see CONSTITUTIONAL LAW, 4.

Remedy for Overvaluation.

2. Where a tax is for a legal purpose and the assessors have jurisdiction and proceed in accordance with the statutes, their decision as to the nature and amount of the taxable property of a person who has not brought in a list under Pub. Sts. c. 11, § 72, cannot be attacked in any collateral proceeding, and can be changed only in a proceeding under the statute for an abatement. *Harrington v. Glidden*, 486.

3. A resident of a certain city, who had taxable personal property there in his individual name and also had in his name as trustee for a New York corporation of which he was a director certain shares of corporations organized in other States, was assessed and taxed both on the property held by him as an individual and on that held as trustee. He presented no sworn list of his individual property, but, several months after the warrant had been committed to the collector, filed a sworn statement purporting to relate only to the property held by him as trustee, alleging that he had as trustee no property in his hands liable to taxation. In an action brought against him as trustee to recover the tax, the jury found that the assessors "ascertained as nearly as possible the particulars of the personal estate held by the defendant as trustee for the purposes of making this assessment," and that "having obtained those particulars they estimated such property at its just value according to their best information and belief." The court being of opinion that the evidence fully justified the findings of the jury, *held*, that the defendant could not question the valuation of the assessors, his grievance, if any, being one of overvaluation for which his only remedy was by the statutory proceeding for an abatement. *Harrington v. Glidden*, 486.

Collection.

4. Under St. 1889, c. 334, § 7, which provides, that if a tax remains unpaid for three months after it is committed to the collector, he may sue in his own name to collect it, the statute of limitations does not begin to run until the expiration of the three months, as the collector has no right of action except that given him by the statute. *Harrington v. Glidden*, 486.

Sale.

5. A deed under a valid tax sale passes a paramount and new title, and a seisin from the moment of conveyance. *Perry v. Lancy*, 183.
6. In case of a conveyance under a tax sale it will be presumed that possession followed the tax title, especially in the case of marsh land probably not occupied by any one. *Ibid*.
7. A conveyance, on foreclosure sale, of land that has been sold for taxes and is in possession of the purchaser at the tax sale, although under St. 1891, c. 354, it passes the rights of entry and of action, does not disseise the holder of the tax title. *Ibid*.
8. St. 1888, c. 300, § 40, provides, that in case of a tax sale the collector may sell the whole or any part of the land and after satisfying the taxes and charges shall pay the balance "to the owner of the estate" upon demand. *Held*, that the word "owner" as used in this clause does not include a mortgagee not in possession, unless his interest as mortgagee has been taxed to him as real estate under Pub. Sts. c. 11, § 14. The mortgagee, however, has an equitable lien on the proceeds of the land, which he may enforce in equity against the grantee of the mortgagor or his assignee with notice. *Worcester v. Boston*, 41.

Mortgagee's lien on surplus of proceeds.

- 9 A mortgage of land provided, that the mortgagor should pay all the taxes and assessments upon the premises and that in default thereof he

Tax (*continued*).

should pay to the mortgagee all sums that the mortgagee should reasonably pay for such taxes, and that in case of a sale under the power contained in the mortgage the mortgagee should retain from the proceeds all sums secured by the deed. The mortgagor failed to pay a tax and the land was sold for taxes under St. 1888, c. 390. The mortgagee on learning of the sale redeemed the land from it under the provisions of the same statute. In a suit in equity by the mortgagee to recover the surplus of the proceeds from the tax sale, it was *held*, that, in enforcing his lien on such proceeds against the grantee of the mortgagor, the mortgagee was entitled to have the amount paid by him to redeem from the tax sale treated as part of the mortgage debt. *Worcester v. Boston*, 41.

Enforcement by mortgagee as claimant in trustee process of lien on surplus of proceeds of tax sale, see TRUSTEE PROCESS.

Redemption.

10. If a tender to redeem from a tax sale under St. 1888, c. 390, § 57, has been prevented by the conduct of the holder of the tax title in wilfully and successfully eluding a mortgagee of record having the right to redeem, who has been searching for him for the purpose of paying him and has written to him repeatedly offering to pay, the mortgagee is in the same position, as against the person eluding him, as if the tender had actually been made, and if his attempt to make the tender was made in good faith within two years after he had actual notice of the sale, the lien is discharged, and he can maintain a writ of entry for the land. *Perry v. Lancy*, 183.
11. The right of a purchaser at a foreclosure sale and of his assignee to redeem from a tax sale is settled; and this right exists although the mortgage was given after the lien for taxes had attached and the foreclosure was before the tax sale. *Barry v. Lancy*, 112.
12. Where the holder of a tax title has evaded one holding under a mortgage and thus prevented a redemption, a bill in equity to redeem the land may be brought under St. 1888, c. 390, § 76, at any time within five years from the tax sale. The remedy, by paying the city treasurer, given by §§ 58, 59 of the same chapter, is cumulative and does not exclude the right to equitable relief. Following *Clark v. Lancy*, 178 Mass. 460, on both points. *Ibid*.

St. 1888, c. 390, § 57, giving mortgagee right to redeem from tax sale constitutional, see CONSTITUTIONAL LAW, 3.

Right of redeeming mortgagee to pay taxes not exclusive remedy, see MORTGAGE, 1.

On Collateral Legacies.

13. St. 1895, c. 307, exempting from the tax on collateral legacies bequests not exceeding \$500, does not apply to legacies to which persons became entitled before it took effect. *Howe v. Howe*, 546.
14. Collateral legacies of future and contingent interests are taxable under St. 1891, c. 425. The tax is to be paid when the contingency occurs and the determination of the value of the future interest is to be postponed until the happening of the event. It is then to be valued as of the time of the testator's death. *Ibid*.

15. In valuing future and contingent interests for taxation as collateral legacies under St. 1891, c. 425, when the contingency has happened, a preceding life interest to be deducted must be valued as of the time of the death of the testator and is to be determined by the actuaries' combined experience tables and four per cent compound interest, as required by the last sentence of § 13 of the act, without regard to the actual length of life in the particular case. *Howe v. Howe*, 546.
16. St. 1891, c. 425, imposing a tax on collateral legacies and successions, provides in § 4 that all taxes imposed thereby shall be payable by executors, administrators or trustees "at the expiration of two years from the date of their giving bond," and in § 18 provides that "The treasurer of the Commonwealth shall within six months after the same shall be due and payable, bring suit in his own name for the recovery of all taxes remaining unpaid." *Held*, that the provision in regard to the treasurer bringing suit is directory merely, and does not limit the right of recovery to two years and six months after the giving of bonds by executors, administrators or trustees. *Whether* the general statute of limitations would be applicable to a suit brought by the treasurer after six years from the time when the tax was due and payable, was not before the court and was not considered. *Ibid*.
17. A testator directed his trustees to pay to his sister quarter yearly during her life such sums as with the rents and income of her own property would give her a net annual income of \$10,000, and left remainders which were subject to taxation as collateral legacies under St. 1891, c. 425. The net annual income of the testator's sister from her own property at the time of the testator's death was \$1,453.20, leaving \$8,546.80 to be paid to her by the executors and trustees. For the purpose of deducting the sister's life interest in valuing the collateral legacies, the Probate Court ruled, that she was to be regarded as entitled to an annuity of \$8,546.80 during her life. The treasurer of the Commonwealth objected that the amount that was to be paid to her was not an annuity or life estate that could be appraised by the combined experience tables, as required by § 13 of the act, because it was of uncertain amount and might fluctuate from year to year. *Held*, that for aught that appeared the net income from the sister's own property had remained and would remain substantially the same from year to year and, if that was so, the annuity fairly might be said to be \$8,546.80 during her life, or, as the intention of the testator manifestly was that his sister should receive a net income of \$10,000 during her life, the annuity might be regarded as one of \$10,000 a year, subject to reduction by the amount of the net income if any received from her own property, so that in computing the value of her interest the annuity properly might be reckoned as one of \$10,000 a year, and that in any case the treasurer had no ground for complaint. *Ibid*.

On Corporate Franchise.

18. A corporation having a capital stock divided into shares cannot relieve itself from liability to the franchise tax imposed by Pub. Sts. c. 13, §§ 38-40, by omitting to do business, nor by failing to file the certificate that

Tax (*continued*).

its capital stock has been paid in, required by Pub. Sta. c. 106, § 46, before it can do business. *Attorney General v. Mass., etc. Gas Co.* 15.

What constitutes corporation "having a capital stock divided into shares," see CORPORATION, 1.

Expenditure by town of money raised by taxation for tuition of child at high school in neighboring town, see CONSTITUTIONAL LAW, 5.

Word "taxes" may include sewer assessment, see CONTRACT, 7.

TENANTS IN COMMON.

Tenants in common entitled to partition as matter of right, see JOINT TENANTS, 1, 2.

TENDER.

Tender in redemption from tax sale dispensed with by conduct of defendant, see TAX, 10.

TRADE-MARK.

A trade-mark does not give the proprietor the right to control the sale by others of articles of his manufacture. It is merely to secure him and the public from deception and fraud as to the origin and source of his goods and of similar goods sold in the market. *Garst v. Hall & Lyon Co.* 588.

TRESPASS.

For restraint of continuing trespass, see EQUITY JURISDICTION, 4.

Where equity will not compel defendant to restore land of plaintiff to its original condition, see *Ibid.*

Duty towards mere licensee, see NEGLIGENCE, 20.

TRUST.

Powers of Trustee.

1. A testatrix having one son and four daughters devised all her real estate to her son, in trust, to hold, manage and improve the same for twenty years, to distribute the net income equally among all her children, and at the termination of the twenty years to divide the property equally among her children. The will also contained this clause: "And I hereby further authorize and empower my said trustee at any time before the said period of distribution, if he deems it for the best interest of all concerned so to do, to divide the trust property of whatsoever consisting, or the same or any portion thereof to sell at public or private sale and the proceeds to divide equally among my said children and their respective heirs and assigns, and to terminate this trust." The will, after naming the son as devisee of the residue of the estate in trust, did not mention him again by name as trustee, but gave the powers thereunder to "my trustee," "my said trustee," "such trustee," or "the trustee under the trust." The

will contained numerous other powers attached to the trust and not personal to the trustee named in the will. The son died nearly ten years before the testatrix, who died without making any change in her will. Trustees under the will, appointed by the Probate Court, asked for instructions as to their power to divide the property before the expiration of the twenty years, alleging that they deemed it for the best interest of all concerned to make the division, the children being all of age and all but one desiring it. *Held*, that the trustees had the power to make immediate distribution of the property, having, under Pub. Sts. c. 141, § 6, the same powers, rights, and duties as if they had been originally appointed. The cases holding, that a power given to the executor of a will cannot be exercised by an administrator *de bonis non* with the will annexed, have no application to this case. *Stanwood v. Stanwood*, 223.

Administration cy pres.

2. A testatrix left an estate called Seven Oaks to the Sisters of St. Margaret, a Protestant Episcopal charitable and religious society, to be used for the maintenance of a temporary home for poor and invalid women, only so long as these sisters should choose to occupy and use it for these or similar purposes, or on the termination of such use then to any similar religious or charitable association of sisters of the Protestant Episcopal faith in the United States that will use and occupy the estate for the above named charitable purposes, and, if none such be found, then to the Massachusetts General Hospital for the above named or similar charitable purposes. The Sisters of St. Margaret, other associations of sisters and the Massachusetts General Hospital successively declined to accept the estate for the purposes named in the will. Other charitable and religious corporations, not associations of sisters or of the Protestant Episcopal church offered to accept the property and administer the trust under the terms of the will. Seven Oaks was upon the seashore, and the establishment of a seashore home was a prominent feature of the plan of the testatrix. If Seven Oaks could be sold and about a third of the proceeds invested in a house and lot at the seashore, the Sisters of St. Margaret were willing to put one of the sisters in charge of such house and to use the income of the remainder of the proceeds in carrying out the wishes of the testatrix so far as they could with this and such other funds as they could obtain. The Massachusetts General Hospital was willing, in case Seven Oaks was sold, to accept the proceeds for the purpose of applying the income in the maintenance of its Convalescent Home at Waverly, where men as well as women are admitted. Upon a bill filed by the trustees under the will for instructions, it was *held*, that there was a good gift to charity, that it had not failed, and that a sale was necessary, and the following scheme reported by a master was approved by the court, namely, that Seven Oaks be sold and the trustees invest the proceeds and pay the net income therefrom to the Sisters of St. Margaret to be by them devoted to their general charitable work; *provided*, that the trustees may invest not more than a certain sum named, in the purchase of a house and land on or near the seashore, and hold it for the sisters, whenever the

trustees are satisfied, that, with the aid of the income of the remainder of the fund and such other resources as the sisters may have, the sisters are able and willing to establish and maintain there a temporary home for women in accordance with the directions in the will of the testatrix. This scheme was approved by the court on the ground, that, having money to deal with instead of land, the order of preference of beneficiaries established by the will for the land should be followed in dealing with the money. *Amory v. Attorney General*, 89.

Construction of agreement to provide for carrying out of trust, see CONTRACT, 11.

When owner of non-negotiable security indorsed in blank not estopped from asserting title against *bona fide* purchaser, see CONVERSION, 2, 3.

As to resulting trust after lapsed legacy, see DEVISE AND LEGACY, 3.

TRUSTEE PROCESS.

A mortgagee of land sold for taxes may enforce as claimant in a trustee process his equitable lien upon the surplus proceeds of the sale in the hands of the city or town. If the mortgage does not cover the whole of the proceeds, an attaching creditor of the mortgagor, plaintiff in the trustee process, is entitled to the balance in the hands of the trustee after the claim of the mortgagee is satisfied. *Cummins v. Christie*, 74.

VERDICT.

General verdict on two counts, when set aside, see PRACTICE, CIVIL, 13.

VETERAN.

Holding "an office or employment in the public service of any city or town," see CIVIL SERVICE ACT.

WAIVER.

By grantor of right to enforce restriction on land, see EASEMENT, 3.

WAKEFIELD.

Construction of order of board of health of Wakefield adjudging certain deposits on land of plaintiff to be nuisance, see BOARD OF HEALTH, 4.

WATER SUPPLY AND WATERWORKS.

Jurisdiction of State board of health under St. 1897, c. 510, not exclusive, see BOARD OF HEALTH, 1.

Extent of jurisdiction of town boards of health over nuisances affecting purity of water supply, see BOARD OF HEALTH, 2.

Motive of town board of health in adjudging certain deposits on land to be

nuisance affecting purity of water supply of town immaterial, see BOARD OF HEALTH, 5, 6.

Construction of taking of land for reservoir, see EMINENT DOMAIN, 1.

Whether temporary use of water in pond constitutes taking, see EMINENT DOMAIN, 2.

Whether water rights can be taken by eminent domain without a writing, see ESTOPPEL, 4.

Construction of St. 1895, c. 451, enabling city of Gloucester to supply itself and its inhabitants with water, see GLOUCESTER WATER SUPPLY, 1-3.

WAY.

Notice of defect.

1. In an action under Pub. Sts. c. 52, § 18, against a city for injuries caused by the caving in of a sidewalk on which the plaintiff was walking, it appeared, that the earth beneath the sidewalk might have been undermined by an escape of water from a water pipe of the city, that, three or four days before, complaint had been made to the water department, that water came from the street into the cellar adjoining the sidewalk where the accident occurred, and that employees of the water department examined the cellar and saw the water coming in through the foundation wall of the building then took up the pavement in front of the sidewalk and did some work there, and the flow of water stopped. *Held*, that there was no evidence that the city had reasonable notice of the defect or might have had such notice by the exercise of proper care and diligence, as the appearance of the ground at the point where the water department stopped work might have given no indication that the earth beneath the sidewalk had been washed out. *Brummett v. Boston*, 26.

Undergoing Repairs.

2. One, who in the daytime enters a street which he knows is not graded or fit for public travel, does so at his peril. The fact that other persons before he entered drove wagons over the street, choosing to take the same risk for the sake of making a short cut, does not help him. *Compton v. Revere*, 413.
3. When the condition of a street is such as in itself to give notice that the way is not open to public travel, it is not necessary to place barriers there to warn the public that it is unsafe to proceed. *Ibid*.
4. When city authorities are repairing or constructing a street, one who drives between wooden horses bearing the sign "No passing through," which have been placed across the way or are temporarily standing lengthwise at the side of the road in such a position as plainly to indicate that it is not open to travel, does so at his own risk. In this case, however, the evidence was conflicting and would justify a finding that the part of the way on which the plaintiff was driving was open to travel. *Buiman v. Newton*, 1.

Amount of betterments for widening street assessed upon remaining land immaterial to show value of land taken, see DAMAGES, 1.

Powers of city council of Everett as to laying out and widening streets, see MUNICIPAL CORPORATIONS, 2, 3.

Municipal corporation liable for negligence of agents repairing street, see MUNICIPAL CORPORATIONS, 5, 6.

WILL.

For cases on construction of wills, see DEVISE AND LEGACY.

Sufficiency of letter constituting agreement to leave property by will, see FRAUDS, STATUTE OF, 1.

Execution of power of appointment, see POWER, 1, 2.

New trustee appointed by court has powers of original trustee, see TRUST, 1.

Construction of devise as gift to charity, see TRUST, 2.

WITNESS.

Cross-examination.

1. On the issue of the soundness of mind of a testatrix who had been a domestic servant, a niece of the testatrix who was a servant in the same house testified as a witness for the contestants to many peculiar actions of the testatrix, and as to her using disrespectful language in the presence of her employer and disobeying his orders. She was asked on cross-examination "Did you ever hear Dr. G. find any fault with your aunt during all the time you were there, and if so, what did he say?" The question was admitted for the purpose of contradicting the story told by the witness on her direct examination. The witness in answer testified to a number of times when the employer had found fault with the testatrix. *Held*, that the question was admissible. *Hogan v. Roche*, 510.
2. When evidence admissible for one purpose is inadmissible for another, upon which it would have a bearing if not excluded by rules of law, it must be assumed that a justice passing upon the facts considers it only upon those issues which it legitimately affects. Thus expressions of opinion as to the sanity of a testator at the time he did certain acts, admitted on cross-examination for the purpose of showing the improbability of the statements made by the same witnesses on their direct examinations, will be assumed to have been taken into account, by the justice who allowed the will, only so far as they tended to contradict premises seeming to lead to a different conclusion, and not as evidence tending in itself to establish sanity. *Ibid*.
3. On the issue of the soundness of mind of a testatrix, a witness for the contestants testified to peculiar actions of the testatrix. It had appeared in evidence that six years before the date of the will, the testatrix made a present of \$1,000 to a son of the witness. On cross-examination the witness was asked "Do you think that at that time — did you at that time think that the testatrix had sufficient mental capacity to give that money to your son?" He answered "I suppose she had." Another witness, who had testified to peculiar actions of the testatrix, was asked on

cross-examination about a certain remark made to the witness by the testatrix, and was then asked "Do you think she knew what she was about when she said that?" and answered "I don't know," and then being asked "What is your opinion?" answered "I think she was all right at that time." To the further question "Did you think at that time she knew what she was talking about?" the witness answered "I think she did," and to the question "Do you think so now?" gave an affirmative answer. *Held*, that in spite of the rule that a witness, who is not an expert or a subscribing witness to the will is not allowed to give his opinion as to the soundness of mind of a testator, the questions put in this case afforded the contestants no ground for exception; that the whole object of the questions was to show how the testatrix appeared to the witnesses at the times in question and thus to show the improbability of the previous statements made by the witnesses, and that for this purpose the cross-examination was legitimate, although the result might have been reached in a less questionable manner. *Hogan v. Roche*, 510.

WORDS.

- "Taxes." See *Williams v. Monk*, 22, 25.
- "Owner." See *Worcester v. Boston*, 41, 46.
- "Conviction." See *Munkley v. Hoyt*, 108, 109.
- "Legally." See *Bigelow v. Pierce*, 331, 333.

WRIT OF ENTRY.

What constitutes equitable defence to, under St. 1883, c. 223, § 14, see **EQUITY JURISDICTION**, 1.
See also **REAL ACTION**, 1-3.

STATUTES.

STATUTES CITED AND EXPOUNDED.

ENGLISH STATUTES.

31 Hen. VIII. c. 1.	Partition	203, 205
———— § 3.	“	205
32 Hen. VIII. c. 32.	“	203
3 & 4 Wm. IV. c. 27, § 36.	Statute of Limitations	203
45 & 46 Vict. c. 61, § 64.	Bills of Exchange	508

STATUTES OF THE UNITED STATES.

June 7, 1897, c. 4, art. 15.	Fog Signals	471
July 1, 1898, c. 541.	Bankruptcy	540
———— § 67 f.	“	460
———— § 70.	“	125

STATUTES OF CONNECTICUT.

Gen. Sts. §§ 1501, 2002, 3541, 3607.	Evasion of Fare	246
--------------------------------------	-----------------	-----

STATUTES OF NEW HAMPSHIRE.

1889, c. 5.	Railroad	68
Pub. Sts. c. 156, § 28.	“	68

STATUTES OF VIRGINIA.

February 27, 1866, c. 18, § 2.	Slave Marriage	220
--------------------------------	----------------	-----

PROVINCIAL STATUTES.

1692-93, c. 14.	Estates of Deceased Persons	205
1693, c. 8.	Partition	203
1748-49, c. 12.	“	203
1753-54, c. 18.	“	203
1760-1761, c. 13.	Estates of Deceased Persons	205

STATUTES OF THE COMMONWEALTH.

1783, c. 36, § 4.	Estates of Deceased Persons	205
—— c. 41.	Partition	203
1785, c. 50, § 6.	Tax	494
—— c. 62, § 2.	Partition	203

1785, c. 70, §§ 6, 7.	Tax	45
1788, c. 4.	"	494
1817, c. 190, § 24.	Partition	205
1823, c. 133.	Tax	549
1827, c. 88.	Nuisance	388
1834, c. 182, § 5.	Statute of Frauds	180
1839, c. 114.	Salem and Danvers Aqueduct	375
1842, c. 84.	Tax	494
1845, c. 90.	Worcester Aqueduct	375
1846, c. 167.	Boston Water Supply	376
1848, c. 235.	Tax	494
1850, c. 192.	Springfield Aqueduct	375
— c. 198.	Worcester Aqueduct	375
— c. 273.	Salem and Danvers Water Supply	375
1852, c. 210.	Pittsfield Water Supply	375
1854, c. 206.	Contracts by County Commissioners	240
1856, c. 111.	Gary's Wharf	565
— c. 241.	Lebanon Springs Aqueduct	375
1857, c. 135.	Jamaica Pond Aqueduct	375
1859, c. 171.	Tax	494
1862, c. 101.	Bribery	240
1865, c. 132.	Lynn Aqueduct	376
1866, c. 175.	Newburyport Water Supply	376
— c. 294, § 1.	Street Railway	450
1867, c. 73.	Haverhill Aqueduct	375
— c. 84.	Easthampton Aqueduct	376
— c. 272.	Marlborough Aqueduct	376
— c. 275.	Statute of Limitations	565
1868, c. 182.	Jamaica Pond Aqueduct	376
1869, c. 121.	Partition	205
1870, c. 337, § 2.	Boston	60
1871, c. 218.	Lynn Water Supply	376
— c. 307.	Woburn Water Supply	376
1872, c. 274.	Bribery	240
— c. 282.	"	240
— c. 318, § 1.	Mechanic's Lien	157
— c. 345.	Springfield Water Supply	376
1873, c. 242.	Arlington Lake Water Co.	376
— c. 326, § 2.	Newton	8
— — § 24.	"	7
1874, c. 191.	Danvers Water Supply	376
— c. 266.	Partition	205
1875, c. 232.	City and State Contracts	240
1876, c. 42.	Sturbridge Aqueduct	376
1878, c. 189, § 4.	Tax	494
1880, c. 127.	Berkshire Water Co.	376
— c. 179.	Amherst Water Co.	376
— c. 203.	Gloucester Water Supply	376

1881, c. 167, § 2.	Gloucester Water Supply Co.	378
— — — — § 3.	“ “ “	373, 377
— c. 304.	Tax	49
1882, c. 119.	Spencer Water Co.	375, 376
— c. 142.	Revere Water Co.	376
— c. 175.	Tax	49
— c. 192, § 3.	Northborough Water Supply	377
— c. 210, § 2.	Newton	8
1883, c. 73.	Mortgage	124
— c. 223, § 10.	Equity Jurisdiction	468
— — — — § 14.	“ “	455
— c. 226.	Betterment Agreements	150, 152
— — — — § 1.	“ “	151
1884, c. 309, § 23.	Waltham	8
1885, c. 178, §§ 2, 3.	Boston	322
1887, c. 270, § 1, cl. 1.	Employers' Liability Act	191
— c. 348.	Fence	317
— c. 392.	Intoxicating Liquors	110
1888, c. 372.	Will	30
— c. 390, § 40.	Tax	45, 46, 75
— — — — § 57.	“	113, 186
— — — — §§ 57, 76.	“	185
— — — — §§ 58, 59, 76.	“	114
— — — — §§ 60-63.	“	51
— c. 405.	Special Judgments	541
— — — — §§ 1, 2.	“ “	540
— c. 431.	Superintendent of Schools	575
1889, c. 334, § 7.	Tax	494
— c. 442.	Determination of Incumbrances	325
— — — — § 1.	“ “ “	327
— c. 454, §§ 1, 5.	Dog	581
1890, c. 127.	Tax	491
— c. 265.	Appointment of Administrator	221
— c. 428, §§ 3, 5, 6.	Grade Crossing	521
— — — — §§ 3, 5.	“ “	523
— — — — §§ 5, 8.	“ “	522
— c. 441.	Pollution of Water Supply	388
1891, c. 354.	Tax Sale	186, 222
— c. 370, § 12.	Gas	382
— c. 425.	Collateral Inheritance Tax	552
— — — — §§ 1, 4-6, 18.	“ “ “	548
— — — — §§ 1, 13, 17, 18.	“ “ “	551
— — — — § 13.	“ “ “	550
— — — — § 14.	“ “ “	547
— — — — § 16.	“ “ “	549
1892, c. 355, §§ 21, 23, 26, 33.	Everett	151
— — — — §§ 26, 33.	“	152
— c. 419, § 31.	Boston	356

1893, c. 200.
— c. 271, §§ 1, 2.
— c. 340, § 1.
1894, c. 309.
— c. 436.
— c. 450, § 1.
— c. 498, §§ 6-8.
— c. 522, § 48.
— ——— § 60.
— ——— § 91.
1895, c. 94.
— c. 212.
— c. 234, § 4.
— c. 307, § 1.
— c. 451.
— ——— § 16.
1896, c. 397, §§ 5, 7-9.
— ——— § 9.
— c. 415, §§ 2, 3.
— ——— § 7.
— c. 445.
— c. 517, § 5.
— c. 537.
— ——— §§ 1, 3.
1897, c. 137, § 2.
— c. 197.
— ——— § 2.
— c. 402.
— c. 510, § 7.
1898, c. 266.
— c. 434, § 4.
— c. 490.
— c. 496, § 3.
— c. 533, § 124
— ——— § 125
— c. 535.
— c. 562, § 19.
— c. 578, § 11.
1900, c. 119.
— c. 345.
— ——— §§ 1, 3
— c. 426.
— ——— § 3.
1901, c. 44.

Superintendent of Schools	575
Bribery	240
Quieting Title	327
Dog	581
School	575
Gas and Electric Light Companies	20
School	575
Insurance	13
“	266, 435
“	437
School	575
“	575
Vacation of Judgments	107
Collateral Inheritance Tax	552
Gloucester Water Supply	384
“ “ “	380, 381, 382
Registered Pharmacist	110
“ “	109
Lowell	499
“	500
Evidence	395
Civil Service	411
Massachusetts Pipe Line Gas Co.	18
“ “ “	20
County Commissioners	240
Insurance	13
“	12, 14
Assigned Claims	365
Pollution of Water Supply	388
Corporation	20
Boston	322
Abuse of Corporate Powers	241, 322, 500
School	573
Alteration of Instruments	508
“ “	507
Declarations of Deceased Persons	246, 395
Registration of Title	327
Street Railway	450
County Commissioners	240
Guardian	133
“	134
Fitchburg Railroad Lease	66
“ “ “	68
School	575

REVISED STATUTES.

c. 7, § 7.	Tax	48
— §§ 7, 29, 31.	“	46

c. 8, §§ 1, 7, 11, 18, 24, 25, 32.	Tax	46
— §§ 28, 29.	"	45
c. 74, § 3.	Statute of Frauds	180
c. 79, § 9.	Guardian	134
c. 103, § 1.	Partition	203
— § 42.	"	205

GENERAL STATUTES.

c. 12, §§ 18-20.	Tax	494
— § 33.	"	46
c. 17, § 23.	County Commissioners	240
c. 105, § 4.	Statute of Frauds	180
c. 109, § 8.	Guardian	134
c. 136, § 1.	Partition	203

PUBLIC STATUTES.

c. 11, § 14.	Tax	50, 76
— §§ 14-16.	"	49
— §§ 38-42.	"	490
— §§ 69-72.	"	491
c. 12, §§ 21-23.	"	494
— § 35.	"	46
c. 13, §§ 38-40.	"	18
— § 39.	"	21
c. 22, § 22.	County Commissioners	240
c. 27, § 111.	Town Treasurer	240
— § 128.	Abuse of Corporate Powers	7
— § 129.	Fines and Forfeitures	241
c. 44, § 3.	School	575
— § 44.	Superintendent of Schools	575
c. 49, §§ 68, 75.	Way	7
c. 52, §§ 1, 3, 13	"	7
— § 3.	"	6, 8
— § 18.	"	26
c. 73, § 6.	Carrier	330
c. 77, § 3.	Interest of Money	88
— § 6.	Bond	351
c. 78, § 1, cl. 4.	Statute of Frauds	431
— § 2.	" "	431
— § 4.	" "	180
— § 5.	" "	407
c. 80, §§ 20, 26.	Nuisance	388
— §§ 20-27, 28.	"	387
c. 106, § 24.	Corporation	61
— § 48.	"	18, 19, 20
— § 60.	"	20
c. 112, § 214.	Railroad	524

c. 113, §§ 7, 27, 63.
c. 115.
c. 130, § 1, cl. 3.
c. 136, § 9.
—— § 10.
—— §§ 22, 23.
c. 139, § 7.
c. 141, § 6.
c. 142, § 1.
—— § 4.
—— § 22.
c. 153, § 5.
c. 159, § 51.
c. 161, § 66.
—— §§ 126, 128.
—— § 128.
c. 165, § 1.
c. 167, § 12, cl. 2.
—— §§ 49 <i>et seq.</i>
—— § 53.
c. 171.
—— § 23.
c. 172, § 30.
—— § 46.
c. 173, § 14.
—— § 18.
c. 176, § 1.
c. 178, § 1.
—— § 43.
—— §§ 43, 45-47.
c. 184, § 13.
c. 188.
—— § 1.
—— § 3.
—— § 12.
c. 191, §§ 1, 2.
—— § 6.
—— §§ 6, 21.
—— § 19.
—— § 42.
c. 192, § 24.
c. 196, § 11.
c. 197, § 1.
c. 205, §§ 11-13.
c. 207, § 29.

Street Railway	450
Beneficiary Association	61
Appointment of Administrator	221
Statute of Limitations	548
“ “	336
Payment of Legacies	333
Guardian	134
Powers of Trustee	227
Probate Court Jurisdiction	455
“ “ “	451
Executor curing Irregularity	456
Charging Jury	580
Auditor	153
Attachment	537
“	540
“	541
Actions which survive	585
Demurrers	173
Interrogatories	505
“	501
Judgment and Execution	540, 541
Special Judgments	537
Levy by Sale	462
Notice	461
Writ of Entry	164
“ “	163
Quieting Title	327
Partition	203, 204
“	204, 205
“	206
Replevin	41
Arbitration	265
“	266
“	267
“	262
Mechanic's Lien	157
“ “	360
“ “	215
“ “	601
“ “	422, 423
Lien	587
Statute of Limitations	565
“ “	548
Bribery	240
Rogues and Vagabonds	533

HARVARD LAW LIBRARY

